IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18,903

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On Petition to Review and Set Aside Order of the Federal Trade Commission

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BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

STATEMENT OF JURISDICTION

This brief is filed on behalf of the petitioners, Fred Meyer, Inc. (hereinafter referred to as Fred Meyer), a corporation, and Fred G. Meyer and Earle A. Chiles, individuals,[1] to review and set aside an Order and Opinion of respondent Federal Trade Commission (hereinafter referred to as the Commission), issued on July 9, 1963 and

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[1] The individual petitioners, Fred G. Meyer and Earle A. Chiles, are Chairman of the Board and President, respectively, of Fred Meyer, Inc. Fred G. Meyer owns 38.35% and Earle A. Chiles 14.37% of the 1,479,250 shares of voting stock in Fred Meyer, Inc. (CX 363, pp. 3, 11).

served on petitioners on July 26, 1963 (R. 148-57).[2] The Order is based upon the Commission's two-count Complaint (R. 3-11) charging violations of section 2(f) of the Clayton Act, as amended (15 U.S.C. § 13(f)) and of section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45). Petitioners filed their petition to review on September 17, 1963 (R. 707-14).

Jurisdiction of this Court is expressly provided by section 5(c) of the Federal Trade Commission Act, as amended (15 U.S.C. § 45(c)), and section 11(c) of the Clayton Act, as amended (15 U.S.C. § 21(c)), which authorize the filing, within sixty days from the date of service of a Commission order, of a petition to review in the Court of Appeals for any Circuit where the method of competition or act or practice in question occurred, or where the person or corporation against whom the order is issued resides or carries on business. The acts and practices involved in this proceeding occurred in Portland, Oregon, within this Court's jurisdiction, and petitioners reside and carry on business within the jurisdiction of this Court, the principal office and place of business of Fred Meyer being located at 721 Southwest Fourth Avenue, Portland, Oregon (R. 3, 12).

STATEMENT OF THE CASE

A. HISTORY OF THE PROCEEDING

Fred Meyer is an Oregon corporation operating thirteen retail grocery supermarkets in the Portland, Oregon area (R. 27, 60, 164-5). Its net sales exceed $40 million annually (CX 363, p. 4).[3]

For approximately twenty-five years, during a four-week period beginning in September and ending in October, Fred Meyer has conducted an annual promotion called the "coupon book promotion" (R. 62, 166; CX 1, 4, 24) which consisted of the offering to consumers by Fred Meyer of

[2] The abbreviation "R." refers to the Transcript of Record printed and filed in accordance with the rules of this Court.

[3] The abbreviation "CX" refers to Commission Exhibit.

special prices and terms of sale on certain featured products through the medium of coupon books. In conjunction with and as part of the promotion, Fred Meyer specially promoted the featured products through various and numerous advertising and merchandising media. Prior to each promotion, coupon books were printed and distributed to consumers. The books contained seventy-two coupon pages, each relating to a different item. On redemption of these coupons, consumers received various benefits, such as free or sample items, and reduced prices on multiple purchases (R. 29).

To finance the coupon book promotions, Fred Meyer invited the participation of its suppliers. Suppliers agreeing to participate received a page in the coupon book advertising the particular product chosen to be featured, plus numerous promotional services and facilities furnished and conducted by Fred Meyer designed to promote the featured products during the period of the promotion. Suppliers participated under terms agreed upon prior to the promotion (R. 167, 169-70, 181). Some, for example, granted allowances related to the volume of goods purchased by Fred Meyer for resale during the promotion, paid flat sum promotional allowances, or redeemed coupons submitted by consumers.

All payments received from and made by the participating suppliers were designed and contemplated to constitute reimbursement to Fred Meyer for the furnishing of promotional services and facilities, consisting, at a minimum, of the printing of coupon books, preparation and dissemination of sales bulletins to Fred Meyer's sales personnel, conducting of sales meetings and sales contests to inform and offer incentive to Fred Meyer's sales personnel, preparation and construction of window displays, in-store displays, signs and banners, and conducting of newspaper and radio advertising (CX 6, 13, 18, 19, 200, 201; R. 428-30, 692).

At various times, Fred Meyer has also conducted promotional programs unrelated to the coupon book promotion, and, in some instances, received promotional allowances from certain of its suppliers in connection with such promotions (R. 75-76).

On May 15, 1959, the Commission issued a two-count complaint against petitioners (R. 3-11). Count I of the complaint charged that petitioners violated section 2(f) of the Clayton Act, as amended (15 U.S.C. § 13(f)),[4] by inducing and receiving "discriminatory prices, discounts, allowances, rebates and terms and conditions of sale" from suppliers which they knew or should have known were granted by such suppliers in violation of section 2(a) of that Act (15 U.S.C. § 13(a)).[5] Said discriminatory prices were allegedly granted by suppliers in connection with the coupon book promotion described above.

Count II of the complaint charged that petitioners violated section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45),[6] which prohibits unfair "acts or practices in commerce," by inducing and receiving payments from certain suppliers in consideration for the fur-

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[4] Section 2(f) of the Clayton Act provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

[5] Section 2(a) of the Clayton Act provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

[6] Section 5 of the Federal Trade Commission Act provides in pertinent part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

nishing of promotional services or facilities which petitioner knew or should have known were granted in violation of section 2(d) of the Clayton Act, as amended (15 U.S.C. § 13(d)).[7] The allegations contained in Count II of the complaint primarily concern petitioners' annual coupon book promotion. The Commission also challenged, under Count II, certain promotional allowances paid to Fred Meyer which were unrelated to the coupon book promotion. Petitioners denied the allegations of illegality under both Count I and Count II (R. 12-17).

On January 23, 1962, after administrative hearings, an initial decision was filed by a Hearing Examiner finding violations as charged (R. 18-54). Petitioners appealed to the Commission and, on March 29, 1963, a three-member majority of the Commission affirmed the Examiner and issued a proposed order to cease and desist (R. 56-142).[8] Exceptions to the proposed order were rejected and, on July 9, 1963, the proposed order was adopted by the Commission as its final order (R. 148-57).

B. DESCRIPTION OF THE ALLEGEDLY UNLAWFUL TRANSACTIONS

The allegedly unlawful transactions involved in this case relate to the receipt of certain payments granted by five suppliers of Fred Meyer: Tri-Valley Packing Association, Idaho Canning Company, Cannon Mills Company, Burlington Industries, Inc., and Philip Morris Company. All of the challenged transactions, except those involving

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[7] Section 2(d) of the Clayton Act provides:

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[8] One member of the Commission dissented in part to the action of the majority and one Commissioner did not participate (R. 142).

Philip Morris, relate to payments received by Fred Meyer in connection with its 1956, 1957 or 1958 coupon book promotions.

Thus, Tri-Valley Packing Association is alleged to have favored Fred Meyer in terms of sale and promotional benefits over Hudson House, a wholesaler, in connection with the 1957 coupon book promotion; Idaho Canning Company is alleged to have favored Fred Meyer in the same manner as against Hudson House and Wadhams & Company, also a wholesaler, in connection with the 1957 coupon book promotion; Cannon Mills Company allegedly favored Fred Meyer as compared to Roberts Brothers, a retailer, in connection with the 1956 coupon book promotion; and Burlington Industries, Inc. allegedly favored Fred Meyer over Lipman, Wolfe & Company, a retailer, in connection with the 1957 and 1958 coupon book promotions. These challenged coupon book transactions are summarized in the following table:

Year	*Supplier*	*Product Sold To Fred Meyer*	*Allegedly Disfavored Customer*	*Date of Agreement On Terms*	*Date of Coupon Promotion*
1. 1957	Burlington Industries, Inc.	"Rose Dawn" nylon hose (private brand)	Lipman, Wolfe & Co., (retailer)	March, 1957 (R. 427)	Sept.-Oct., 1957 (CX 4, p. 34)
1958	Same	Same	Same	March, 1958 (R. 433-34)	Sept.-Oct., 1958 (CX 24, p. 34)
2. 1956	Cannon Mills, Inc.	Fingertip Towels	Roberts Bros. (retailer)	March, 1956 (CX 119-22; R. 359-60)	Sept.-Oct., 1956 (CX 1, p. 37)
3. 1957	Idaho Canning Company	"My-Te-Fine" whole kernel or cream style corn (private brand)	Hudson House (wholesaler) Wadhams & Co. (wholesaler)	Spring, 1957 (R. 208)	Sept.-Oct., 1957 (CX 4, p. 61)
4. 1957	Tri-Valley Packing Association	"My-Te-Fine" yellow cling sliced or halved peaches (private brand)	Hudson House (wholesaler)	Spring, 1957 (R. 193-94, 553, 587)	Sept.-Oct., 1957 (CX 4, p. 60)

In addition to the foregoing, the Commission also alleged, under Count II of the complaint, that the acceptance by Fred Meyer of certain payments unrelated to the coupon book promotions from Philip Morris Company violated section 5 of the Federal Trade Commission Act. The customers of Philip Morris which are alleged to have been discriminated against in terms of promotional benefits are Oregon Piggly Wiggly Company, a retail grocery chain, and United Grocers, Inc., a wholesaler-cooperative. It is not charged that Philip Morris granted price discriminations in violation of section 2(a), or that Fred Meyer received price discriminations from Philip Morris in violation of section 2(f).

SPECIFICATION OF ERRORS

1. The Commission erred as a matter of fact[8a] and of law in holding that the payments received by Fred Meyer from its suppliers for the coupon book promotions are cognizable under sections 2(a) and 2(f) of the Clayton Act. These payments are cognizable, if at all, only under section 2(d) of the Clayton Act and section 5 of the Federal Trade Commission Act.

2. The Commission erred as a matter of fact and of law in holding that section 2(d) of the Clayton Act requires a seller who offers or grants payments for services or facilities to its *retail* customers to offer proportionally equal payments to its *wholesale* customers.

3. The Commission erred as a matter of fact and of law in holding that the payments by the suppliers herein involved violated either section 2(a) or section 2(d) of the Clayton Act.

4. The Commission erred as a matter of fact and of law in holding that petitioners knew or had reason to know that the prices or allowances received from suppliers were

[8a] None of the conclusory findings of violation are supported by reliable, substantial and probative evidence as required by the Administrative Procedure Act. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

granted in violation of section 2(a) or section 2(d) of the Clayton Act.

5. The Commission erred as a matter of law in holding that it is authorized to proceed against a buyer under section 5 of the Federal Trade Commission Act for the alleged inducement of payments in consideration for the furnishing of services and facilities alleged to have been granted in violation of section 2(d) of the Clayton Act.

6. The Commission erred in issuing an order to cease and desist against the individual petitioners since special circumstances presenting a likelihood that the corporate petitioner will evade or attempt to evade the order are absent.

7. The Commission erred in failing to frame its order to cease and desist in terms which bear a reasonable relationship to the practices alleged to be unlawful.

SUMMARY OF ARGUMENT

I. The Payments Received From Suppliers In Connection With The Coupon Book Promotions Are Not Cognizable Under Section 2(a) or 2(f) Of The Clayton Act

Misconstruing the evidence, the Commission has concluded that all the suppliers which participated in the coupon book promotions made payments to Fred Meyer of $350; that only these payments were made in consideration for the furnishing of services and facilities rendered by or through Fred Meyer and, therefore, were the only payments which constituted true promotional allowances within the meaning of section 2(d); and that amounts paid in excess of $350 were necessarily price concessions cognizable under the section 2(a)-2(f) charge of the complaint. These findings are erroneous.

The terms of participation in, and the payments received by Fred Meyer for, the coupon book promotions resulted from agreements entered into between Fred Meyer and each participating supplier which contemplated that the payments were in consideration for services and facilities rendered by Fred Meyer in conducting the promotion and featuring the agreed upon products of each supplier.

Thus, each payment was made, in the language of section 2(d), "as compensation or in consideration for . . . services or facilities furnished by or through" Fred Meyer "in connection with the processing, handling, sale or offering for sale" of the products of each supplier. While price concessions, to fall within the purview of section 2(a), must be intended to induce the *original sale,* promotional payments under 2(d) relate only to the *resale.* The Commission erroneously and arbitrarily attempted to segregate certain portions of each supplier's payment and construe one portion as a price concession and another as a true promotional allowance. This cannot be done.

Moreover, the evidence is that less than half of the suppliers actually made payments of any flat sum, such as $350. Where such a flat sum payment was made, it was in consideration for only one of the five separate and distinct services and facilities which were performed by Fred Meyer in connection with the coupon book promotion, *viz.,* preparation and printing of the coupon books. The remainder of the payments by suppliers which did grant flat sum allowances were in consideration for the other and substantial services and facilities rendered. Since it is clear that each supplier intended that its payment be promotional in nature, there can be no finding that any portion of any supplier's payment actually constituted a price concession rather than a true promotional allowance absent specific and exact proof that services and facilities were not in fact rendered by Fred Meyer in accordance with the understanding of the parties.

As a matter of law, the cost of the services and facilities rendered by Fred Meyer are not required to equal the dollar payments made in consideration of such services and facilities. *Lever Brothers Co.,* 50 F.T.C. 494 (1953). For example, the value to a seller of a mass aisle-end display in petitioners' stores cannot be measured with any degree of precision. Moreover, even as to direct and indirect expenses incurred by Fred Meyer which could be measured, no evidence was adduced. The Commission, therefore, erred in entering an order to cease and desist under Count I of the complaint (see *infra,* pp. 16-26).

II. Section 2(d) Does Not Require A Seller Who Offers or Grants Promotional Allowances to a Retail Customer to Offer Comparable Benefits to Wholesale Customers

It is long-standing precedent that a seller who offers or grants payments as compensation for the furnishing of promotional services or facilities to one or more of its *retail* customers is *not* required to offer proportionally equal benefits to its *wholesale* customers. The Commission, however, now attempts to reverse this precedent and, in re-interpreting the statute, has held that *wholesalers* must be offered benefits comparable to those offered or granted *retailers.* Such a novel re-interpretation of the statute, if approved, would revolutionize present distributional patterns and practices in many industries. Moreover, such an interpretation ignores entirely the fact that Congress, in section 2(d), did not expand the applicable concept of competition as it did in 2(a). Finally, the Commission's holding is directly contrary to this Court's holding in *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F.2d 694, 707 (9th Cir. 1964) (see *infra,* pp. 26-37).

III. The Commission Failed to Prove that Payments by Any of the Suppliers Involved Violated Section 2(a) or 2(d)

In proceedings under sections 2(a) and 2(d), the Commission is required to prove, *inter alia,* that the allegedly favored and disfavored customers (1) purchased goods of like grade and quality (2) at or about the same time and that, (3) at the time in question, these customers actually and effectively competed in the resale of such products. However, the fragmentary evidence adduced by the Commission fails entirely to establish that the products which Fred Meyer purchased for resale during the coupon book promotions, and which were featured under agreement with participating suppliers, were purchased, handled, or sold by the allegedly disfavored customers, or that products which were purchased by such customers were of like grade and quality within the meaning of the statute to those purchased and featured by Fred Meyer.

The Commission also failed to adduce evidence sufficient to establish that the allegedly disfavored customers purchased products of like grade and quality from the suppliers involved at or about the same time as did Fred Meyer.

The nature of Fred Meyer's coupon book promotion rendered it essential that all arrangements be concluded well in advance of the promotion itself, which was conducted during a four-week period in September and October. Negotiations for the promotion were commenced in January or February of each year and agreements as to prices, allowances and other terms of sale were reached in the spring of each year. There is no evidence, however, which shows the prices, allowances, or other terms of sale which were in fact offered or available to the allegedly disfavored customers at the time the actual agreements were reached.

Nor has the Commission established that the allegedly disfavored customers actually competed with Fred Meyer in the resale and distribution of the relevant products. As noted previously, three of the allegedly disfavored customers, Wadhams & Co., Hudson House and United Grocers, insofar as the transactions in this case are concerned, operated solely as wholesalers. Under this Court's *Tri-Valley* decision, *supra,* wholesale customers do not compete with retail customers within the meaning of section 2(d) and it was essential to a finding of violation of that section that the Commission prove (1) actual competition between the retail customers of such wholesalers and Fred Meyer and (2) that such retail customers of the wholesalers were actually "indirect" customers of the suppliers charged to have violated section 2(d). However, in no instance did the Commission attempt to establish the required "indirect" customer relationships or successfully trace the relevant products to the shelves of the retail customers of such wholesalers.

The Commission's failure to adduce reliable probative and substantial evidence sufficient to prove the above essential elements of the alleged supplier violations requires dismissal of both Count I and Count II of the complaint (see *infra,* pp. 37-66).

IV. Fred Meyer Neither Knew Nor Had Reason to Know that the Prices and Payments Received from Suppliers Were Unlawful

Section 2(f) of the Clayton Act makes it illegal for a buyer to induce or receive discriminations in price when the buyer knows or has reason to know that such prices are prohibited by section 2(a) of the statute. In addition, it has been held that the Commission may proceed under section 5 of the Federal Trade Commission Act against a buyer who has induced a seller to grant a promotional payment or allowance which the buyer knows or has reason to know is unlawful under section 2(d) of the Act.[9]

The Commission has attempted to overturn the Supreme Court's holding in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953). That case sets forth the applicable tests for cases which involve the alleged inducement of discriminatory prices. Thus, the Commission failed to find that Fred Meyer "knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices" (*Id.* at 79). There is no evidence that Fred Meyer exerted any "pressure" upon sellers to participate in the coupon book promotion.

Secondly, the Commission totally disregarded the requirement that, under section 2(f), it must be shown that the buyer knew the seller could not justify its prices. In *Automatic Canteen,* the Supreme Court declared that an inference of "guilty knowledge" could not properly be drawn unless the allegedly favored and disfavored buyers purchased in substantially the same quantities and were served in the same manner and with the same amount of exertion. Here, however, the Commission failed to find that the quantities were substantially the same or that the manner of service and the amount of exertion on the

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9 Petitioners contend that these holdings are in error (see *infra,* pp. 91-94).

seller's part were the same. To the contrary, the record conclusively demonstrates that Fred Meyer purchased unusually large quantities in connection with the coupon book promotion. Moreover, the Commission has failed to establish that the manner of service and the amount of exertion on the seller's part in obtaining orders for goods to be used in the coupon book promotion and in obtaining orders from allegedly disfavored customers were similar. Instead, the Commission merely infers that Fred Meyer is "unable" to get price concessions from its suppliers during eleven months of the year and, based upon this inference, further infers that the purchase of an extremely large quantity of products for the coupon book promotion could not give rise to measurable cost savings. This inference, based upon nothing more substantial than speculation, is completely contrary to the evidence.

It was incumbent upon the Commission to establish that Fred Meyer's suppliers incurred no cost savings and that Fred Meyer knew or should have known this fact. That this essential element of proof cannot be inferred and that the Commission erred in so inferring is eloquently demonstrated by reference to the price concessions granted by Cannon Mills. The Commission has found that these concessions were received by Fred Meyer with "knowledge" of illegality. No evidence was adduced by the Commission as to the possible cost justification of Cannon Mills' prices. However, in a proceeding against Cannon Mills itself for the granting of the very prices Fred Meyer has been found to have induced unlawfully, Cannon Mills successfully proved that such prices were cost justified. *Cannon Mills Co.,* Docket 7494, Initial Decision (Dec. 3, 1963). Indeed, the Examiner found that Cannon Mills' cost savings were even greater than required to justify the price concessions to Fred Meyer.

It is clear, therefore, that the Commission has drawn improper inferences and ignored substantial evidence concerning the nature of the questioned transactions and the mode of doing business in the retail grocery industry which would lead a reasonable man to believe that the prices received by Fred Meyer could be cost justified by its suppliers (see *infra,* pp. 66-79).

The so-called proof relied upon by the Commission in an effort to establish that the promotional allowances received by Fred Meyer were known to be in violation of section 2(d) is equally defective (see *infra,* pp. 79-90).

V. The Commission is not Authorized to Proceed Against a Buyer for the Alleged Inducement of Disproportionate Promotional Payments Under Section 5 of the Federal Trade Commission Act

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." While the Commission has held that section 5 authorizes it to proceed against a buyer for the alleged inducement of disproportionate promotional payments, and while this interpretation of this statute has been sustained, over strong dissent, by two Circuit Courts of Appeal [10] the issue has not yet been finally determined.

It is petitioners' position that the dissenting views which have been expressed accurately state the law and must prevail. Thus, while section 2(f) prohibits buyers from inducing discriminations in price which are prohibited by 2(a), and while section 2(c) prohibits buyers from inducing illegal brokerage allowances, a prohibition against the inducement of allegedly discriminatory promotional allowances was "studiously omitted" from the statute. The Commission's effort to supply, through interpretation, a legislative "oversight" is contrary to applicable standards of statutory construction and cannot stand (see *infra,* pp. 91-94).

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[10] *Grand Union Co.* v. *Federal Trade Commission,* 300 F.2d 92 (2d Cir. 1962); *American News Co.* v. *Federal Trade Commission,* 300 F.2d 104 (2d Cir. 1962), *cert. denied,* 371 U.S. 824 (1962); *Giant Food Inc.* v. *Federal Trade Commission,* 307 F.2d 184 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 910 (1963).

VI. The Commission Erred in Issuing an Order to Cease and Desist Against the Individual Petitioners

Orders to cease and desist against officers of a corporation in their individual capacity are proper only where "special circumstances" exist which indicate a likelihood of evasion of the order by the corporation. Such "special circumstances" are absent in the present case. If any order to cease and desist is proper in the present case, it can only be directed against the corporation and its officers, representatives, agents and employees in their corporate capacity, not in their individual capacity (see *infra,* pp. 95-96).

VII. The Commission Erred in Issuing an Order Which Bears No Reasonable Relation to the Acts and Practices Alleged to be Unlawful

Existing precedent makes it clear that Commission orders must be framed in terms bearing a reasonable relationship to the practice alleged to be in violation of the law. In the present case, however, the Commission has entered a broad, all-encompassing order to cease and desist which covers all acts and practices cognizable under the statute. This is true of the orders issued under both Counts I and II. If any order to cease and desist is proper, it must be directed solely against the allegedly illegal aspects of the coupon book promotion and must clearly advise petitioners of the acts or practices which are to be discontinued (see *infra,* pp. 96-102).

ARGUMENT

I. INTRODUCTION

The ultimate issue presented here is whether petitioners induced unlawful prices and promotional payments from suppliers with knowledge or reason to believe that such prices and allowances were granted in violation of the law. As a prerequisite to a finding that petitioners violated the law, it must first be established that the specified suppliers violated section 2(a) or 2(d), or both. However, before reaching the question of whether each of the specified suppliers violated section 2(a) or section 2(d), or both, or whether Fred Meyer knew or should have known this, there are two threshold questions which, if decided favorably to petitioners, will narrow substantially the scope of the case. These threshold questions are:

1. Were the payments received by Fred Meyer from suppliers in connection with the coupon book promotion cognizable under section 2(f) of the Clayton Act? If not, as petitioner here urges, then Count I falls and the Court need only concern itself with Count II.

2. Does section 2(d) of the Clayton Act, involved in Count II, require a seller who offers or grants promotional benefits to a *retail* customer to offer proportionally equal benefits to *wholesale* customers who operate at a different functional level? If, as petitioner here urges, a seller is not required to make proportional offers to such wholesale customers, then all of the Count II evidence in this case respecting two of the five suppliers, and part of the evidence respecting a third supplier, can be totally disregarded, thus narrowing substantially the scope of the case.[11]

II. THRESHOLD QUESTION NO. 1: ARE THE PAYMENTS RECEIVED FROM SUPPLIERS IN CONNECTION WITH THE COUPON BOOK PROMOTIONS COGNIZABLE UNDER SECTIONS 2(a) AND 2(f) OF THE CLAYTON ACT

Petitioners submit that the payments received from suppliers in connection with the coupon book promotions are not cognizable, as alleged in Count I, under sections 2(a) and 2(f) of the Clayton Act. These payments were true promotional allowances within the meaning of section 2(d) of the Act, and their alleged inducement is cognizable, if at all, only under section 5 of the Federal Trade Commission Act. This conclusion is compelled by the fact that (1) the coupon book promotion was an institutional pro-

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[11] The two suppliers regarding which all evidence can be disregarded are Idaho Canning Company and Tri-Valley Packing Association. The allegedly disfavored customers of these suppliers are the wholesalers, Wadhams & Co. and Hudson House. Likewise, the evidence relating to Philip Morris Company's dealings with United Grocers, Inc., also a wholesaler, can be disregarded.

motion involving a combination of advertising and promotional services furnished by or through Fred Meyer "in connection with the processing, handling, sale or offering for sale" of the individual supplier's products, and (2) the payment of each supplier was made pursuant to agreement with Fred Meyer which contemplated, and was tied directly to, the furnishing of promotional services and facilities by Fred Meyer in connection with the resale of the products of the participating suppliers.

Section 2(a) of the Clayton Act deals with and prohibits discriminations in "price" under certain specified conditions. Section 2(d), on the other hand, deals with and prohibits, under certain specified conditions, "the payment of anything of value to or for the benefit of a customer . . . as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale" of a seller's products.

Thus, the ultimate legal question here involved is whether participation in the Fred Meyer coupon promotion resulted in the sale of commodities to Fred Meyer at a "price" reduction or whether the result was the "payment" to Fred Meyer of "anything of value . . . as compensation or consideration for any services or facilities furnished by or through" Fred Meyer "in connection with the processing, handling, sale or offering for sale" of the products of the participating suppliers.

"Price," as stated by the FTC's Advisory Committee on Cost Justification, "is measured by the value of the consideration which passes from buyer to seller" and is "net of all applicable allowances, discounts and rebates which the buyer receives or is entitled to receive in view of the quantities and methods of his purchases." Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), p. 92. Thus, "price" is regarded as the net consideration which induces the *original sale,* as distinguished from consideration flowing from factors other than inducement of the striking of the deal as such between buyer and seller. Rowe, *supra,* at 379. The "mere acceptance by a purchaser of a promotional offer intended to facilitate the *original sale,* does not constitute the rendering of a service or facility by the purchaser within the meaning of Section 2(d).'' *New England Confectionery Co.,* 46 F.T.C. 1041, 1059 (1949) (emphasis added); Rowe, *Ibid.* On the other hand, where the consideration passing between buyer and seller is in some way tied to the *resale,* as distinguished from *original sale,* the net consideration passing between buyer and seller is not, within the meaning of section 2(a), an element of ''price''. Rather, it is a "payment" for ''services or facilities furnished'' by the customer ''in connection with the processing, handling, sale or offering for sale'' of said products. As stated by Rowe: "As a rule of thumb, sections 2(e) and 2(d) will govern the supplier's provision of any form of *cooperative* advertising or promotional expenditures or services in connection with the customer's *resale* of the product'' Rowe, *supra,* at 372 (emphasis in original). Thus, if the consideration rests upon factors other than normal price negotiations between buyer and seller to effectuate the *original sale,* the transaction falls within section 2(d). *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d 694, 708 (9th Cir. 1964). "Price", as negotiated in connection with an original sale, has no strings attached and is not dependent upon the ''resale'' functions and activities of the purchaser.

Consistent with the foregoing clear understanding of the relationship of the two sections, the courts have held, for example, that a consideration passing between buyer and seller in connection with freight and delivery arrangements is not within section 2(d), but is cognizable, if at all, under section 2(a) as an element of ''price''. *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38, 56 (8th Cir. 1951). Likewise, consideration passing between buyer and seller as the result of credit arrangements does not fall within the definition of services or facilities, but rather are elements of ''price''. *Skinner* v. *United States Steel Corp.,* 233 F.2d 762, 765 (5th Cir. 1956). Obviously, such elements of consideration relate to the original sale, not to resale. On the other hand, it is well settled that where money or something of value is granted by a seller to a buyer with the intention that the buyer render advertising or promotional services or facilities, there is a payment "as compensation or in consideration" for such services, and the transaction is cognizable, if at all, under section 2(d). *Tri-Valley Packing Association* v. *Federal Trade Commission, supra,* at 708; *Yakima Fruit & Cold Storage Co.,* 59 F.T.C. 693 (1961). Section 2(d) is inapplicable only if the payment granted "does not have any connection with" the customer's resale. *Skinner* v. *United States Steel Corp., supra* at 765; Rowe, *supra,* at 383.

There is no question that the Fred Meyer coupon book promotion involved an integrated and comprehensive cooperative program of advertising and promotional services conducted "by or through" Fred Meyer "in connection with the processing, handling, sale or offering for sale" of the individual supplier's products. Contrary to the situation where a "price" is negotiated to facilitate the "original sale," the payments received by Fred Meyer were tied to and totally dependent upon the "resale" activities of Fred Meyer. Fred Meyer was not free, under the agreements reached with the suppliers, to pay for the goods, receive the promotional allowances agreed upon and then "go its own way." It was obligated to offer the goods for resale during the period of the promotion and was further obligated, in order to promote the resale of such goods, to print, and distribute to consumers, coupon books containing graphic advertisement of the featured products, specially promote such products through in-store displays and broadcasts, prepare and utilize point-of-sale materials, specially display at point-of-sale the pertinent coupon page advertisements, redeem and tabulate the coupons in accordance with agreed upon terms, conduct special newspaper and radio advertising, and conduct a host of other related activities, all in connection with the resale of the commodities involved (CX 6, 13, 18, 19, 200, 201).

It being the intention of the parties as to the use and nature of a payment or concession which controls the issue of whether that payment constitutes a promotional allowance or a price concession, it is obvious that the coupon book transactions challenged here fall only within the purview of section 2(d). The Commission, however, arbitrarily segregated portions of each supplier's payment and held that only the first $350 of each payment constituted a true promotional allowance. The amount of each supplier's payment in excess of $350, held the Commission, was "of an entirely different character" and constituted an "outright price concession" in that such amounts were in no way connected with promotional services or facilities furnished by Fred Meyer or with the resale by Fred Meyer of the featured products (R. 70). In view of the commitments made by Fred Meyer to induce participation by suppliers, and in view of the uncontradicted evidence that Fred Meyer did in fact furnish numerous and substantial services and facilities, this conclusion of the Commission is incomprehensible.

Suppliers who participated in the coupon book promotion were promised and received, *at a minimum,* the following services or facilities (CX 6, 18, 19):

1. *Printing and Distribution of Coupon Books.* Coupon books containing approximately 72 coupons, each featuring a different item, were printed by Fred Meyer and sold to Fred Meyer's customers at 10¢ per book (R. 64). The coupon pages usually contained a graphic representation of each item, a statement of its "regular" price, a statement of the "coupon" price, a statement of the amount in dollars and cents of what the coupon was "worth" in savings to the consumer, and similar statements common in advertising material (R. 62-63).

2. *Sales Bulletins and Meetings.* Sales bulletins were disseminated to Fred Meyer's sales clerks. Sales meetings were held and sales contests were conducted. The purpose of these activities was to keep Fred Meyer's sales clerks fully informed concerning the selling points of the

featured products and to direct their efforts in promoting the products of participating suppliers (CX 6, 8, 19).

3. *In-Store Displays, Banners and Broadcasting.* Window and in-store displays, signs, banners and in-store broadcasting were prepared and furnished during the coupon book promotions. Thus, for example, Fred Meyer was obligated to prepare "a feature display sign in our stores containing your coupon. . ." (CX 6).

4. *Newspaper Advertising.* Newspaper advertising featuring the products of participating suppliers was conducted. Such advertisements appeared almost daily in the Oregon Journal, The Oregonian, the Eugene Register Guard and other newspapers during the period of the coupon book promotion (CX 6).

5. *Radio Advertising.* Radio advertising featuring the products of participating suppliers was conducted on the "Fred Meyer Consumer News," a news program transmitted daily by radio station KOIN, Portland, Oregon. The coupon book items were also advertised on "Fred Meyer Dance Time," a two-hour musical program, and "spot" advertisements were placed on a number of radio stations, including stations KWJJ, KXL, KPOJ, KEX and KGW (CX 6, 18, 19).

Direct expenses alone incurred by Fred Meyer in furnishing the above services and facilities, plus others, in connection with the coupon book promotions were as follows:

Service or Facility	1956 (CX 13)	1957 (CX 200)	1958 (CX 201)
Newspaper Advertising	$7,622	$7,911	$7,474
Art Work, Engraving, etc.	655	64	64
Other Production Costs	1,246	—	—
Printing Books	9,845	9,845	10,734
Payroll (Counting Coupons)	1,525	1,515	1,545
Radio Spots	1,020	391	1,020
Prizes for Selling Books	934	1,081	—
Printed Signs	256	599	1,151
Handmade Signs	205	244	201
Freight Paid on Free Merchandise	—	1,756	—
Hauling	—	—	11
	23,318	23,406	22,200

In addition, Fred Meyer incurred substantial indirect expenses, including general overhead, merchandisers' and buyers' time, travel expenses, accounting expenses, employees' time in erecting and maintaining special in-store displays over a 4-week period, etc. (CX 6, 13, 18, 19, 200, 201). The Commission, however, failed to adduce evidence as to the amount of such expenses.

Moreover, while the Commission inferred that each of the 72 participating suppliers paid $350 for a coupon book page (R. 64-65), the actual evidence is that fewer than 30 of the 72 participating suppliers paid such an amount (or any other flat sum) toward the cost of the coupon book itself (CX 2 A-C, 5 A-B, 23 A-C). Thus, during the years in question, 1957, 1958 and 1959, the amounts actually paid by suppliers toward the cost of the coupon book were substantially less than that found by the Commission. In 1956, 27 suppliers made payments for coupon book pages ranging from $150 to $625 for a total of $9,385 (CX 2 A-C). In 1957, 24 suppliers made such payments ranging from $250 to $350 for a total of $8,100 (CX 5 A-B). In 1958, 26 suppliers made payments ranging from $175 to $350 for this purpose, the total amounting to $8,365 (CX 23 A-B).[12]

In the case of suppliers who paid a flat sum in cash or in kind as all or part of the payment toward the coupon book promotion, the amount paid was in reimbursement only of ". . . all art work, type setting, printing, distribution, sale and handling costs" in connection with the book itself (CX 7). Fred Meyer's expenditures for other services, such as newspaper and radio advertising, payroll, prizes, signs and freight, were not compensated for by the $350 (or any other flat sum) payment.

There is, therefore, no evidentiary support for the Commission's finding that the total cost of the promotional

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[12] These figures are derived from tabulations introduced by Commission counsel. Other Commission exhibits reflect approximately the same amounts. These exhibits indicate that in 1956 total receipts toward the coupon book expenses were $9,250 (CX 13); in 1957, $8,100 (CX 200); and in 1958, $9,415 (CX 201).

services and facilities performed by Fred Meyer was compensated for by the amounts received from suppliers for the purchase of coupon book pages. Nor is there evidentiary support for the ultimate conclusion of the Commission that a portion of the supplier payments did not constitute compensation to Fred Meyer for the furnishing of the various promotional services and facilities. In short, while the evidence is inconclusive as to the total expenses incurred by Fred Meyer, there can be no question on this record but that expenditures substantially exceeded the amount which the Commission has found to constitute "true" promotional payments.

In any event, this is quite irrelevant. As a matter of law, the cost to Fred Meyer of the services and facilities rendered by it are not required to equal the dollar payments made in consideration of such services and facilities. *Lever Brothers Co.,* 50 F.T.C. 494 (1953). This is only common sense, since, for example, the value to a seller of a large aisle display in each of petitioners' thirteen stores cannot be measured with any degree of precision in terms of dollars and cents, although it is obviously something of great value to the supplier. Thus, promotional payments by sellers are made in consideration of "value" of services and facilities rendered, not on the basis of an equation of dollars (*Id.* at 511).

The Commission itself has recognized that, where a supplier's payment is intended to constitute compensation for the furnishing of promotional services and facilities, such payment cannot be construed to be other than a promotional allowance unless there is obvious subterfuge. In *Giant Food, Inc.,* 58 F.T.C. 977 (1961), Giant was charged with unlawfully inducing and receiving payments from its suppliers and it was alleged ". . . that the respondent did not expend the entire amount of money received from each in advertising his particular products, but unlawfully diverted substantial amounts thereof to its own use" (*Id.* at 1009). Dismissing this allegation, the Commission stated:

> Although Section 2(d) of the amended Clayton Act does not authorize payments for services grossly in

> excess of their cost or value, neither does it prohibit a seller from compensating his buyers for any type of service provided its other standards are met, including a reasonable relationship between the payments and the services being rendered . . . The record in this proceeding, however, affords no criteria for evaluating, separately from the media advertising services performed, the relationship which existed between the payments induced by the respondent and the benefits or values conferred on the suppliers by the in-store facilities and services furnished. For that reason, we are unable to say that the combined value of the in-store services and the aforementioned media advertising was not reasonably related to the amount of the suppliers' payments. There is, therefore, a failure of proof of the allegation that a part of such funds was diverted for respondent's own use. (*Id.* at 1010).

Such a failure of proof has clearly occurred in the present case. A full review of the findings of the Commission, in light of the evidence of record, permits no conclusion other than that the Commission has arbitrarily categorized certain portions of the challenged transactions solely for the purpose of supporting an order against petitioners. The arbitrariness of the Commission's findings is well demonstrated by an examination of the complaints issued against the suppliers of Fred Meyer alleged to have unlawfully participated in the coupon book promotions. Thus, complaints were issued on May 15, 1959, the same day as the complaint against Fred Meyer was issued, against Burlington Industries, Inc. (Dkt. 7493); Cannon Mills Company (Dkt. 7494); Idaho Canning Company (Dkt. 7495) and Tri-Valley Packing Association (Dkt. 7496). While in this case the Commission has charged that the payments by Burlington and Tri-Valley constituted violations of both sections 2(a) and 2(d), the complaints against the suppliers themselves charged violations, involving precisely the same transaction, *only of section 2(d).* In short, in proceedings against the suppliers, the payments here found to have violated sections

2(a) *and* 2(d) were specifically charged to have been within the purview *only* of section 2(d).[13]

In its proceeding before the Commission, Tri-Valley maintained that the payments to Fred Meyer were *not* cognizable under section 2(d) as they were not granted in consideration for the furnishing of any services by Fred Meyer in the sale or offering for sale of Tri-Valley products. Rather, Tri-Valley contended, the payments were made to induce or facilitate the *original sale* of the goods without exacting benefits, services or facilities from Fred Meyer. Rejecting this contention, the Commission specifically found that the allowances granted Fred Meyer were "for merchandising services furnished . . . in the resale" of Tri-Valley products and, therefore, constituted promotional payments within the meaning of section 2(d). *Tri-Valley Packing Association*, Docket 7496, Opinion of the Commission (May 10, 1962), p. 8.

Tri-Valley repeated its contention before this Court on petition to review the Commission's decision. This Court indicated that, had Tri-Valley's payment been made to induce the "original sale" rather than as consideration for the furnishing of services and facilities in the resale of the product, the transaction might well have been outside the scope of 2(d) and cognizable under 2(a), but held:

> Our review of the evidence convinces us that the Commission was warranted in finding that the allowances

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[13] Thus, the Commission's complaint against Tri-Valley alleged:

> PARAGRAPH FIVE: In the course and conduct of its business in commerce, respondent has been and is now, paying advertising and promotional allowances to certain favored customers without making the allowances available on proportionally equal terms to all other customers competing in the distribution of their products.
>
> For example, respondent has participated in the periodic promotion plans of Fred Meyer, Inc., of Portland, Oregon, occurring annually for many years. In 1957 respondent paid $350 for participation in a coupon book program occurring during September and October. In addition to this, respondent redeemed about 27,750 coupons at the September 1957 price of canned peaches, the net effect of which was to pay Fred Meyer, Inc., the value of one can of peaches for every two actually purchased.
>
> Such allowances were not offered or made available on proportionally equal terms by respondent to all other customers competing in the resale of respondent's products with that customer receiving the allowances.

> given Central Grocers and Meyer were in compensation for the promotion, over a period of time, of Tri-Valley's line of products, and were not given exclusively, if at all, to facilitate the original sale by Tri-Valley to those two customers (329 F. 2d at 708).

Furthermore, in its complaint against Cannon Mills, the Commission challenged the payments to Fred Meyer *only* under section 2(a). Indeed, the only payment which the Commission, in complaints against the suppliers, has charged was made in violation of both sections 2(a) and 2(d) was that of Idaho Canning Company, and this case was not litigated.[14]

It must be concluded, therefore, that the Commission has erroneously and arbitrarily interpreted the supplier payments here challenged; that such payments are not cognizable under the section 2(a)-2(f) charge; and that Count I of the complaint must be dismissed.

III. THRESHOLD QUESTION NO. 2: DOES SECTION 2(d) OF THE CLAYTON ACT REQUIRE A SELLER WHO OFFERS OR GRANTS PROMOTIONAL BENEFITS TO A RETAIL CUSTOMER TO OFFER PROPORTIONALLY EQUAL BENEFITS TO ITS WHOLESALE CUSTOMERS

With respect to two of the suppliers involved in this case, the Commission has found violations based solely upon the alleged granting of discriminatory promotional benefits to Fred Meyer vis-a-vis certain wholesale customers of such suppliers. Idaho Canning is alleged and has been found to have disfavored Hudson House and Wadhams & Co., and Tri-Valley is alleged and has been found to have disfavored Hudson House alone. In addition, Philip Morris Company is alleged and has been found to have granted disproportionate promotional benefits to Fred Meyer vis-a-vis two other customers, one of which, United Grocers, is also a wholesaler.

It is petitioners' position that these suppliers, within the meaning and terms of section 2(d), were not required

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[14] Idaho Canning consented to an order to cease and desist. *Idaho Canning Co.*, 58 F.T.C. 657 (1961).

to offer to their wholesale customers promotional benefits proportionally equal to those granted Fred Meyer, a retailer. However, the Commission, in reversing long-standing precedent, has erroneously interpreted section 2(d) to mean that a seller which offers promotional payments to its retail customers must offer proportionally equal payments to its wholesale customers, disregarding the fact that wholesale customers do not functionally compete with the retail customers (R. 85-93).

This issue, one of first impression before the courts, presents a question of far-reaching import transcending the instant case. If affirmed, the Commission's novel interpretation of section 2(d) in this respect will impose an unreasonably harsh and onerous burden upon Fred Meyer in complying with any order issued under section 5 and will serve to revolutionize existing merchandising practices in many industries. Moreover, the Commission's construction of 2(d), in addition to being contrary to law, is beyond the scope of the issues as defined in the complaint.

There can be no question that Hudson House, Wadhams & Co. and United Grocers are wholesalers and operated solely in this capacity with regard to the challenged transactions herein involved.

First, regarding Hudson House, this Court in *Tri-Valley, supra,* noted that Hudson House is principally a wholesaler which owns several retail grocery stores, operated under the name "Piggly Wiggly," in the Portland area. Tri-Valley contended that Hudson House dealt with these stores in the same manner as it did with independent retailers, *i.e.,* in a wholesale capacity. The record in the present case supports this conclusion. Thus, the Vice President and Manager of Hudson House's wholesale division described his company's business as a "wholesale grocery business" (R. 243). Likewise, the General Manager of Oregon Piggly Wiggly testified:

> Q. Hudson House, Incorporated, is a wholesale grocery firm, isn't it, sir?
> A. Correct (R. 313).

In any event, the fact that Hudson House owned three of the 34 Piggly Wiggly stores in the Portland area (CX 96; R. 313) is immaterial since all transactions with Hudson House in this case involve only its operations as a wholesaler, *i.e.,* the alleged discriminatory prices and allowances relate only to dealings with Hudson House itself and not with the individual Piggly Wiggly stores.

United Grocers is a non-profit buying cooperative owned by approximately three hundred retail grocers located throughout the State of Washington (R. 547-49). Insofar as the transactions in this case are concerned, United Grocers acted solely in a wholesale capacity with respect to its members, and is similar to Central Grocers, Inc., one of the allegedly favored customers in the Boston, Massachusetts portion of the *Tri-Valley* case. This Court held that Central Grocers, a quasi-cooperative owned by approximately one hundred retailers in the Boston area, operated as a wholesaler with regard to its retailer-members, buying goods from Tri-Valley and other sources, warehousing them in Boston, and reselling them to such members (329 F.2d at 706).

Similarly, Wadhams & Co., which supplies products to approximately 85 independent retail stores in the Portland area from its own warehouse and approximately 300 independent retailers from its three "cash and carry" units located in Portland, is a wholesaler (R. 265-66).

Prior to the present case, the Commission itself had held that section 2(d) does not require a seller to grant promotional benefits to wholesalers and retailers on equal terms. *Liggett & Myers Tobacco Co., Inc.,* 56 F.T.C. 221, 250-52 (1959). The Commission has consistently made it clear, in orders involving the alleged inducement of disproportionate promotional allowances under section 5 of the Federal Trade Commission Act, that such orders apply *only* to the inducement of allowances which are not made available to customers who, in fact, compete with the buyer in the resale and distribution of the supplier's products. For example. the order in *The Grand Union Co.*, 57 F.T.C.

382 (1960), which is typical, prohibited the respondent from:

> Knowingly inducing, receiving or contracting for receipt of anything of value as compensation or in consideration for advertising, promotional displays or other services or facilities furnished by or through respondent in connection with the sale or offering for sale of products sold to respondent by any of its suppliers, when such payment is not affirmatively offered or otherwise made available by such suppliers on proportionally equal terms *to all their other customers competing with respondent in the sale and distribution of the suppliers' products* (*Id.* at 416; emphasis added).[15]

Likewise, Commission orders under section 2(d) have made it clear that the requirement of proportional equality extends only to customers who, in fact, compete with the recipient of the payment or allowance. A typical 2(d) order thus requires the respondent to make proportionally equal payments to: "all other such customers competing in fact with such favored customers in the resale or distribution of such products. . . .'' *Sperry Rand Corp.,* 55 F.T.C. 655, 663 (1958); to the same effect, see, *e.g., Ronson Corp.,* 55 F.T.C. 1017, 1031 (1959); *Westinghouse Electric Corp.,* 56 F.T.C. 380, 386 (1959); *Bayuk Cigars, Inc.,* 56 F.T.C. 881, 885 (1960).

No previous order of the Commission has included the further clause, which is contained in the order against petitioners: ''including other customers who resell to purchasers who compete with respondents in the resale of such supplier's products'' (R. 58).

Heretofore, it has been well settled that companies which sell to different classes of customers, *e.g.,* consumers and retailers, obviously perform different distributional functions and therefore cannot be deemed ''competitors'' in the distribution and sale of the products involved. Thus, in *Liggett & Myers Tobacco Co.,* 56 F.T.C. 221 (1959), the

15 To the same effect, see *Giant Food, Inc.,* 58 F.T.C. 977, 1012 (1961); *American News Co.,* 58 F.T.C. 10, 30 (1961).

Commission held, on the basis of existing precedents, that vending machine operators selling at the retail level to consumers were not "competing in the distribution of such products or commodities," as that phrase is used in section 2(d), with wholesalers selling to retailers. The Commission held in that case:

> It is obvious that vending machine operators and wholesalers are engaged in different operations. They do not cater to the same class of customer: the vending machine operator sells to the ultimate consumer, whereas the wholesaler sells to the retailer who in turn sells to the ultimate customer. Since they do sell to different classes of customers, the functions they perform in the distribution of cigarettes are different (56 F.T.C. at 251).

The Commission did not presume to find that the retail customers of Wadham's, United Grocers and Hudson House were "indirect customers" of Tri-Valley, Idaho Canning or Philip Morris. Obviously, it could not make such a finding in the absence of evidence showing that those suppliers dealt directly with such retailers and controlled the prices or terms of sale upon which they purchased. Thus, the Second Circuit has held: "If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a 'customer' or 'purchaser' of the manufacturer *if the latter deals directly with the retailers and controls the terms upon which he buys*" (Emphasis added). *American News Co.* v. *Federal Trade Commission,* 300 F. 2d 104, 109 (2d Cir. 1962). See also, *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d 694, 709 (9th Cir. 1964); *K.S. Corp.* v. *Chemstrand Corp.,* 198 F. Supp. 310 (D.N.Y. 1961); *Champion Spark Plug Co.,* 50 F.T.C. 30 (1953); *Kraft-Phenix Cheese Corp.,* 25 F.T.C. 537 (1937).

Arguably, the "indirect customer" doctrine can be justified on the ground that a seller who deals directly with purchasers from its customer knows the identity of such purchasers, is, therefore, able to ascertain the amount of their purchases, and is in a position to proportionalize promotional payments to them. In the absence of such direct dealing and control over the price and other terms of sale, it cannot be contended that a seller is obligated under the statute to proportionalize payments among retailers who purchase from its customers.[16]

Indeed, this Court expressly rejected such a contention in its *Tri-Valley* decision, *supra*. There, answering the argument that Tri-Valley was obligated to offer direct buying retailers an allowance which was proportionally equal to the payments made to Central Grocers, a wholesaler, the Court held:

> As to them [the allegedly disfavored retailers] the only way of showing a section 2(d) violation would be to treat Central Grocers' retail outlets as "indirect" customers of Tri-Valley. This, however, may not be done in the absence of a showing that Tri-Valley engaged in a course of direct dealing with those retail outlets. No such showing was made here (329 F. 2d at 709).

Correspondingly, the Court held that Hudson House, which operated as a wholesaler insofar as the transactions involved were concerned, was not entitled to receive promotional benefits from Tri-Valley proportionally equal to those granted Fred Meyer. The Court held:

> No section 2(d) violation was shown as to the wholesale operation of Hudson House, because that operation was not in functional competition with Meyer, and it was not shown that the independent retailers served by Hudson House were "indirect" customers of Tri-Valley (329 F. 2d at 710).

Obviously, the Commission's holding in the present case is directly contrary to this Court's *Tri-Valley* ruling. See also, *Alhambra Motor Parts* v. *Federal Trade Commission*, 309 F. 2d 213 (9th Cir. 1962).

In addition, the Commission has ignored the fact that Congress, in providing in section 2(d) that a seller must make payments on proportionally equal terms "to all other

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16 It is a much more strained interpretation of the law to require a *buyer* to assure that its suppliers have proportionalized promotional payments among such indirect customers as the Commission attempts to do through its order in this case.

customers competing in the distribution of such products or commodities,'' did not intend to expand the applicable concept of competition beyond the level of the ''customer'' receiving an allegedly discriminatory payment. In contrast, however, 2(a) prohibits price discriminations which may ''prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, *or with customers of either of them . . .*" (emphasis added). Thus, in 2(d) Congress prohibited non-proportional payments where two requirements are satisfied: (1) The persons accorded non-proportional treatment must be ''customers'' of the seller, and (2) they must be ''competing'' customers.

In 2(a), however, Congress prohibited price discriminations between ''purchasers'' [17] where the effect may be to prevent competition with (a) the person granting the discrimination, (b) the person knowingly receiving the benefit of the discrimination, or (c) customers of either of them. In a proceeding under 2(a), a seller who discriminates in price against a wholesale customer and in favor of a direct retail customer may be found to be in violation of the law where the discrimination adversely affects the ability of the wholesaler's customers to compete with the favored retailer. For example, in *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 55 (1948), the Supreme Court upheld that portion of a 2(a) order which prohibited the respondent from ''selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer.'' In so ruling the Court relied upon 2(a)'s prohibition against discriminatory prices which adversely affect competition with "any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.'' No such provision appears in 2(d).

[17] The terms ''purchaser'' and ''customer'', as used in various sections of the Robinson-Patman Act, are synonymous. See Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act,* 2d Ed. Rev. (1959), p. 120.

More recently, the Supreme Court has held that where Congress, in the Robinson-Patman Act, intended to expand the applicable concept of competition beyond a particular distributional level, it did so in express terms, as in section 2(a). In ruling that a manufacturer is not a "competitor" of a non-integrated retailer competing at the retail level with the manufacturer's direct customers, the Supreme Court held in *Federal Trade Commission* v. *Sun Oil Co.,* 371 U.S. 505, 514-15 (1963):

> Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in § 2(b) if the defense available thereunder were similarly intended to be broadly read to encompass, as is urged, the meeting of lower prices set not only by the offending seller's competitor, but also by the purchaser's competitor. There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2(b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2(a); the reasonable inference is quite the contrary.

Because the Supreme Court, in the *Sun* case, held that the term "competitor" in 2(b) means a person competing at the seller's level, it is both logical and necessary, in accordance with principles of statutory construction, to conclude that the term "customers competing" in 2(d) means persons competing at the customers' level and does not refer to all persons who engage generally in the overall distribution of the products involved.[18]

In the present case the Commission admits, as it must, that Fred Meyer did not compete with wholesalers in the direct resale of any product. Thus, the Commission found that ". . . only the retailer-customers of these two whole-

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[18] Similarly, in *Chicago Sugar Co.* v. *American Sugar Refining Co.,* 176 F.2d 110 (7th Cir. 1949), the court held that distributors of sugar and industrial users who bought direct from the refiner could not be deemed to be "customers competing in the distribution of the commodity."

salers [Hudson House and Wadhams] compete with respondents in the direct resale of the goods to consumers'' (R. 89). It asserted, however, that wholesalers, who admittedly do not compete with Fred Meyer in the resale of goods to consumers, are somehow in competition in the ''distribution'' of the products. This conclusion is basically unsound, both as a matter of policy and of statutory construction. The phrase ''competing in the distribution,'' as used in 2(d), can, at most, mean competition in one of the four distributional functions described in 2(d): (1) processing, (2) handling, (3) sale, or (4) offering for sale. Since the Commission has admitted that Fred Meyer did not compete with wholesalers ''in direct resale'' of goods, it would clearly require a strained construction of the statute, and the evidence in this case, to contend that it competed with wholesalers in the ''processing,'' ''handling,'' or ''offering for sale'' of the goods in question. In any event, the matter was laid to rest by the Supreme Court's ruling in *Sun Oil, supra.*

The only case cited by the Commission in support of its unprecedented interpretation of the statute is *Krug* v. *International Telephone & Telegraph Corp.,* 142 F. Supp. 230 (D. N.J. 1956) (R. 93). This case is not inconsistent with this Court's decision in *Tri-Valley* or the Supreme Court's decision in *Sun Oil.* In the *Krug* case, the district court indicated, in ruling on a motion to dismiss the complaint for failure to state a cause of action, that a violation of 2(d) may occur where a manufacturer gives a direct buying retailer a promotional allowance which is not offered to a distributor. But it should be noted that in *Krug* the distributor possessed an exclusive territorial franchise which authorized him to sell to franchised retailers. This franchise arrangement, of course, placed Krug in a position essentially analogous to that of a distributor integrated forward to the retail level. The franchise arrangement thus placed Krug's customers in a position analogous to ''indirect customers'' of the manufacturer. In discussing the analogous situation in *Sun Oil,* the Supreme Court indicated, without ruling on the question, that an integrated supplier-retailer should be deemed to be a "competitor" of a supplier selling directly to an independent retailer within the meaning of the Robinson-Patman Act. In short, the *Krug* case involves nothing more than a special application of the familiar "indirect customer" doctrine and is, therefore, distinguishable on its facts from such cases as *Tri-Valley, Sun Oil* and the present case.

In an effort to avoid the thrust of the foregoing argument, the Commission erroneously stated that the result reached in *Morton Salt, supra*, which involved 2(a), would likewise be reached if Congress, while retaining its present description of price discrimination in 2(a), "i.e., 'discriminate in price between different purchasers,' had made it a *per se* provision like section 2(d) and thus omitted completely all reference to the three levels of competition at which injury can occur" (R. 91). This argument is patently unsound; this is precisely what Congress did not do in 2(a). Congress did *not* say in 2(a) "discriminate in price between different *competing* purchasers," and nothing more. Such a change in the language of 2(a), however, would clearly be required if the analogy which the Commission has attempted to draw between 2(a) and 2(d) were valid. But more than this, the Commission's argument is based on unfounded assumptions: *If* the statute read differently and *if* the *Morton Salt* case were before the Supreme Court under a different statute, the Court would rule the same way as it did.

Moreover, under 2(a), a reasonable probability of competitive injury must be clearly and definitely shown. Congress, on the other hand, made 2(d) a *per se* section. Because of the nature of *per se* violations and the absence of any opportunity for affirmative justification, plus the fact that the Commission is relieved of the burden of showing injury, it is illogical and unfair to assume that Congress meant by its silence to include, by way of construction of 2(d), something which it specifically included in 2(a), a *non per se* section. Indeed, the Commission has recognized that 2(d) ". . . is in itself a very narrow definition of an illegal trade practice" and "covers a limited area," as distinguished from section 2(a). *Vanity Fair Paper Mills, Inc.,* CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 15,796, at p. 20,610 (1962). The very rationale supporting a *per se* application to 2(d) is that it describes a specific and narrow practice which Congress deemed "always led to the undesired effects on competition." *Grand Union Co.* v. *Federal Trade Commission,* 300 F.2d 92, 99 (2d Cir. 1962).

Furthermore, the complaint issued herein prohibited the Commission from concluding that the failure of sellers to proportionalize payments for services and facilities among wholesalers and retailers was violative of 2(d). Paragraph 10 of the complaint alleged that Fred Meyer had induced payments from certain suppliers, and that "such payments, allowances, services and facilities were not made available by these suppliers on proportionally equal terms to all other customers of such suppliers *competing with respondents* in the sale and distribution of such products" (emphasis added).

Similarly, paragraph 11 of the complaint alleged that the suppliers did not make such payments available to "all their customers *competing with respondents* in the sale and distribution of their products . . ." (emphasis added).

The Commission is bound by its own complaint. At the trial, petitioners were entitled to rely upon the allegations of the complaint and the law with respect thereto as delineating the scope of the issues, legal and factual. Petitioners had no notice that the Commission might consider changing the law by imposing the novel requirement that payments for services and facilities accorded to a direct buying retailer must be offered to a wholesaler.

Because the existence or non-existence of competition is a fact to be determined by observation and not by the processes of logic,[19] it was improper and a denial of due process for the Commission to rule, without notice or an opportunity to defend, that competition exists, "as a matter of law" and as a matter of "statutory interpretation,"

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19 *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 299 (1930).

between sellers shown to be operating at different distributional levels and selling to different classes of customers.

For the foregoing reasons, there is clearly no warrant in law for the Commission's unprecedented ruling that section 2(d) compels equality in promotional payments as between wholesalers and retailers.

IV. THE COMMISSION FAILED TO PROVE THAT PAYMENTS BY ANY OF THE SUPPLIERS INVOLVED VIOLATED SECTION 2(a) OR 2(d)

A. The Law

The payments by Fred Meyer's suppliers can in no sense be construed to fall within the purview of section 2(a) (see *infra,* pp. 16-26). However, assuming *arguendo* that such payments are cognizable under section 2(a) and, consequently, 2(f), the evidence cannot support the Commission's finding that any supplier violated that section. In order to establish a 2(a) violation, there must be a showing of the following essential elements:

(1) That the seller charged with violation sold goods to different customers at different prices, and that at least one of the sales was in interstate commerce;

(2) That the goods sold at different prices were of like grade and quality;

(3) That the sales occurred at or about the same time; and

(4) That the price differentials created a reasonable probability of substantial competitive injury or tendency toward monopoly.

In order to establish a violation of section 2(d), there must be a showing:

(1) That the suppliers charged with violation were engaged in commerce;

(2) That payments in consideration for the furnishing of promotional services or facilities were made by

such suppliers to one customer in connection with the resale of the supplier's products;

(3) That other customers purchased products of like grade and quality to those in connection with which the payments were made at or about the same time; and

(4) That these payments were not made available to all other competing customers on proportionally equal terms.

Each of these elements must be proved by specific and exact evidence and none can be inferred:

> Antitrust cases and, in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing which must be made.[20]

Before discussing the specific facts of this case and the insufficiency of the evidence relied upon by the Commission respecting the above essential elements of the violations charged, we first review the law relating to these elements.

1. The Requirement of Like Grade and Quality

Under sections 2(a) and 2(d), when a supplier grants price reductions or promotional payments, the same reduction or payment must be offered to all other customers of such supplier competing in the resale of the products regarding which the price reduction or promotional payment was granted. However, when such reduction or payments are made in conjunction with the sale or promotion of a *particular product,* the supplier is not obligated to grant equivalent benefits *unless* the allegedly disfavored customers also purchased that particular product. Thus,

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[20] *J. Weingarten, Inc.,* Docket 7714, Opinion of the Commission (March 25, 1963), p. 9.

in *Atalanta Trading Corp.* v. *Federal Trade Commission,* 258 F.2d 365 (2d Cir. 1958), the court categorically rejected the argument that all that need be shown is that a supplier, in the general course of his business, granted a promotional allowance to one customer and not to other customers:

> We cannot accept the Commission's expansive interpretation of Section 2(d), namely, that after showing a supplier has sold a general line of products in a given area and has granted allowances to only one customer, it is immaterial whether or not a product of like grade and quality to the one on which the allowance was made was ever sold to any other customers in that area (*Id.* at 368-69).
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> . . . the existence of another competing purchaser of a product of like grade and quality must also be shown and proof thereof is an essential part of the Commission's case . . . The very term, promotional allowance, implies a product to be promoted. To adopt the Commission's argument would be tantamount to striking out from Section 2(d) the qualifying phrase "competing in the distribution of such products or commodities" and overruling the prior decisions holding that "such products" mean products of like grade and quality (*Id.* at 369-70).

Prior to *Atalanta,* the Commission itself had interpreted "products or commodities" to mean products or commodities of "like grade and quality." In *Henry Rosenfeld, Inc.,* 52 F.T.C. 1535 (1956), the Commission declared:

> The law imposes no requirements that a seller give advertising allowances on all his products if he elects to accord them on one or more articles. When granting any promotional payments, however, the law requires that he make them available on proportionally equal terms to other resellers of that article or articles who compete with recipients of the compensation (*Id.* at 1545-46).

While these cases involved section 2(d) charges, the principle applies equally to section 2(a) charges.[21] Thus, while the use of different labels on the same product does not itself prevent a finding that a supplier discriminated in the sale of goods of like grade and quality,[22] other factors may well prevent such a finding.[23] In *Universal-Rundle Corp.,* 3 CCH Trade Reg. Rep., ¶ 16,948 (1964), the question was whether certain plumbing fixtures sold to a private label customer were of like grade and quality to fixtures sold under the manufacturer's own brand. The raw materials and manufacturing operations used in the manufacture of both lines of fixtures were the same. However, certain physical differences existed between the two lines. In dismissing the 2(a) charge, the Commission held that where it appears that compared products have physical differences which are "not merely artificial or fanciful," it is incumbent upon Commission counsel to prove that such differences do not affect the marketability or consumer preference of such product, and, consequently, the grade and quality of such products (3 CCH Trade Reg. Rep., at p. 22,004).

The failure of proof on the question of like grade and quality is discussed below in conjunction with the facts relating to each individual supplier.

2. The Requirement of Contemporaneous Transactions

In addition to proof that the allegedly favored and disfavored customers purchased, stocked and resold goods of like grade and quality, it was the further burden of the

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21 See, *e.g., Corn Products Refining Co.* v. *Federal Trade Commission,* 144 F.2d 211 (7th Cir. 1944), *aff'd,* 324 U.S. 726 (1945).

22 *The Borden Co.,* CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 16,191 (1962).

23 Although the mere fact that different private labels are used by a manufacturer on the same product may not, in itself, prevent a finding of price discrimination in the sale of such products, such fact is significant in determining whether a buyer of such products under one private label knew, or, indeed, could determine that the manufacturer was selling the same product under a different label, to another competing buyer. This issue is treated fully in connection with the question of petitioners' "guilty knowledge" (see *infra,* pp. 85-89).

Commission to prove that such customers purchased, stocked and resold such products at or about the same time. The time interval elapsing between the compensated promotion of a supplier's goods by one customer and the actual sale of products of like grade and quality to competing customers is highly significant. In *Atalanta, supra,* the court rejected the Commission's finding of illegality on the ground that the sales to competing customers ". . . did not occur even closely within the same time periods as the sales of those products to Giant" (258 F.2d at 371). To interpret section 2(d) as not requiring contemporaneous sales of like products to competing customers, stated the Court, ". . . would stifle rather than encourage competition and have the practical effect of outlawing all promotional allowances" (*Ibid.*).

The law enunciated in *Atalanta* is unequivocal. Under section 2(d), a supplier, of course, is not obligated to offer an allowance to a competing customer on a sale occurring prior to the time that supplier granted the allowance to one customer. Nor does section 2(d) require that the "terms of an initial sale in a given territory . . . freeze the supplier into an immutable position" (*Id.* at 372). The Court stated:

> While it is true that the sale on which the allowance was made occurred after the July 1954 promotional allowances rather than preceding it, it does not follow that without any time limitation whatsoever the supplier was irrevocably committed upon making the first sale to hold open the same promotional allowance to all other prospective purchasers or to refuse to deal with them (*Id.* at 372).

Thus, while the Commission considered it immaterial in *Atalanta* whether the subsequent sale followed the promotional allowances by a matter of weeks or months, the court held that "the time interval is a determining factor" and that, absent proof of contemporaneous sales, it cannot be found that any other competing customer was deprived of the allowances "because there was none" (*Id.* at 372).

The principles enunciated in *Atalanta* were very recently reconfirmed by this Court in *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d 694 (9th Cir. 1964), where it was held that proof that "two customers purchased goods of the same grade and quality from the seller within approximately the same period of time" is an essential part of a *prima facie* case under section 2(d) (*Id.* at 708). Partly because the record failed to show any sale of goods of like grade and quality to a competing non-favored customer "sufficiently close" to the date of the challenged promotional payments, the court set aside the Commission's 2(d) order (*Id.* at 709).

Thus, whether products of like grade and quality were sold to the allegedly favored and disfavored customers "within such a limited period of time so as to be sufficiently contemporaneous to satisfy the Robinson-Patman Act" is a matter of proof which must be adduced in each case. *Krug* v. *International Telephone & Telegraph Corp.,* 142 F. Supp. 230, 235 (D. N.J. 1956). An examination of the evidence in the present case discloses that the Commission failed to prove this indispensable element in many instances.

3. The Requirement of Competition

The existence or absence of competition between the allegedly favored and disfavored customers is solely a question of fact which is susceptible of exact proof and which cannot be inferred. Thus, the Supreme Court declared in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 299 (1930):

> The existence of competition is a fact disclosed by observation rather than by the process of logic . . . .

Likewise, in *Federal Trade Commission* v. *Sun Oil Co.,* 371 U.S. 505, 527 (1963), the Supreme Court stated that, in order to find actual competition between two purchasers,

> . . . both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis.

Before there can be a finding of requisite competition in the resale of products between the allegedly favored and disfavored customers, it must, of course, first be established that such customers purchased goods of like grade and quality and that such purchases occurred contemporaneously. In short, actual competition cannot exist and cannot be found to have existed absent a showing that each customer involved purchased and offered for resale to consumers the specific products in question during the relevant time period. But the burden of proving requisite competition does not end with the mere showing of contemporaneous purchases of like grade and quality products. Obviously, two contemporaneous purchasers of identical goods from the same manufacturer located in different cities, or in distinct and separate competitive areas within the same city, do not compete in the resale of *any* products.

It is the position of petitioners that general testimony of customers that they consider themselves to be in competition with certain other customers located within the same city is insufficient as a matter of law to prove actual and effective competition within the meaning of sections 2(a) or 2(d). This is also the position of the Commission. In *Weingarten, supra,* for example, the Commission declared that the mere showing that two grocery chains operate in the same city and purchased identical items from the same suppliers does not constitute proof of actual competition in the resale of such items because

> . . . not all of the stores of any of these chains are in competition with . . . [the favored customer] and there is no showing in this record that the stores shown to compete with . . . [the favored customer] were actually stocking and selling an allegedly discriminating supplier's goods at approximately the time when . . . [the favored customer] induced and received its promotional allowances.[24]

Petitioners acknowledge that this Court, in its *Tri-Valley* decision, *supra,* has rejected the view that actual competi-

[24] *J. Weingarten, Inc., supra,* p. 7.

tion between specific stores must be proved when dealing with two chain customers within a single city who operate solely at the same functional level. Rather, stated this Court:

> It is sufficient in that case to prove that one has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and that the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time. Actual competition in the sale of the seller's goods may then be inferred even though one or both of the customers have other outlets which are not in geographical proximity to outlets of the other customer (329 F. 2d at 708).

Even under this interpretation, however, the evidence in this case fails to establish actual competition between the allegedly favored and disfavored retail customers. There has been no showing, in many instances, that the allegedly disfavored retail customers contemporaneously purchased goods of like grade and quality.

The Commission likewise erred in basing a finding of 2(d) violation on the suppliers' dealings with the allegedly disfavored wholesale customers involved. Wholesalers, of course, do not compete with retailers as their operations are at different functional levels. In order, therefore, to base a finding of a section 2(d) violation on a supplier's dealings with its wholesale customers vis-a-vis its retail customers, it must be established that the retail customers of the wholesalers were engaged in competition with the allegedly favored direct-buying retailer and that such customers of the wholesalers were actually "indirect" customers of the supplier. *Tri-Valley Packing Association* v. *Federal Trade Commission, supra.*

Of the six allegedly disfavored customers involved herein, three, Hudson House, Wadhams and United Grocers, insofar as the challenged transactions are concerned, operated solely as wholesalers. In no instance, however, was it shown that the independent retailers served by these wholesalers were "indirect" customers of the wholesaler's suppliers. As this Court stated in *Tri-Valley,* this could only have been done by

> . . . showing that . . . [the suppliers] engaged in a course of direct dealing with those retail outlets (329 F. 2d at 709).

Therefore, as to these wholesale customers, there can be no finding of a section 2(d) violation.

B. The Alleged Supplier Violations

1. Burlington Industries, Inc.

The Commission's allegations and findings of violations with respect to Burlington are limited to that supplier's participation in the 1957 and 1958 coupon book promotions. The possibility of Burlington's participation in the 1957 promotion was discussed by representatives of Fred Meyer and Burlington as early as February 1957, and the price and other terms of sale were agreed upon in March of that year (R. 426-27). The terms of Burlington's participation in the 1958 promotion were agreed upon in the spring of 1958 (R. 433-34). Pursuant to the agreement reached, the 1957 coupon book featured Burlington Hosiery, which regularly sold for 98 cents per pair, at 79 cents per pair, or three pairs for $2.25 (CX 4, p. 34). The 1958 coupon book featured Burlington Hosiery, which regularly sold for 98 cents per pair, at 69 cents per pair, or three for $2.00 (CX 24, p. 34). The terms of Burlington's 1957 participation provided that, in consideration for the featuring and promotion of its hosiery, Burlington would grant to Fred Meyer allowances ranging from 50 cents to 94 cents per dozen, depending upon style (R. 429). In connection with the 1958 promotion, Fred Meyer received an allowance of 75 cents per dozen on the hosiery purchased and featured (CX 170-73). The aggregate of these allowances amounted to $1,700 in 1957, and $1,800 in 1958 (R. 69). As the Commission noted, these allowances were not as great as the amount by which Fred Meyer reduced the price to cousumers (R. 69).[25]

Only one customer of Burlington, Lipman, Wolfe & Co., a retail department store with locations in Portland, Salem and Corvallis, Oregon (R. 438-39), is alleged to have been disfavored in terms of price or promotional benefits vis-a-vis Fred Meyer. The Commission found violations of both section 2(a) and 2(d) with respect to Burlington's dealings with this customer. These findings are erroneous. There has been no showing that Lipman, Wolfe contemporaneously purchased products of like grade and quality to those purchased and promoted by Fred Meyer, or that competition in the resale and distribution of Burlington products actually existed between Lipman, Wolfe and Fred Meyer.

We first consider the evidence regarding "like grade and quality." Fred Meyer, in consideration of the payments by Burlington, featured an aggregate of thirteen different grades of hosiery in the 1957 and 1958 coupon book promotions (CX 4, p. 34; CX 24, p. 34). This hosiery was purchased by Fred Meyer from Burlington under Fred Meyer's private brand, "Rose Dawn" (R. 425). Lipman, Wolfe also purchased under private labels, *viz.,* "Waverly" and "Loveliness" (R. 444, 453-55).[26] For the 1957 coupon book promotion, Fred Meyer purchased the very substantial quantity of 1,743 dozen pairs of hosiery from Burlington for sale during the promotion. These purchases, reflected by orders dated May 29 and 31, 1957, consisted of style numbers 603 (950 dozen), 663M (530 dozen), 660M (50 dozen) and 910M (213 dozen).[27] The purchase orders specified that delivery was to be made between August 20 and September 5, 1957.

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[25] Burlington did not pay a flat sum (as found by the Commission) for the cost of the coupon page (CX 5 A, 23 A).

[26] Burlington's nationally advertised brand is ''Cameo.'' There is no evidence that either Fred Meyer or Lipman, Wolfe handled this brand during the years in question (R. 433, 453-55).

[27] CX 141 A, 142 A, 143 A, 145 A, 146 A, 147 A, 148 A.

Between July 17 and October 23, 1957, the date of expiration of the 1957 coupon book (CX 4), Lipman, Wolfe purchased, under six separate invoices, the comparatively small quantity of 388.5 dozen pairs of hosiery, style numbers 603 (66 dozen), 660 (57 dozen), 649 (74.5 dozen) and 519 (191 dozen).[28] Thus, only 123 dozen of the hosiery purchased by Lipman, Wolfe bore style numbers which correspond with style numbers purchased by Fred Meyer, *i.e.,* styles 603 and 660.

Similarly, for the 1958 coupon book promotion, Fred Meyer placed eleven purchase orders on June 2, 1958, and two at later dates for 4,308 dozen pairs of hosiery, style numbers 515 (880 dozen), 519 (659 dozen), 603 (839 dozen), 660 (746 dozen), 663M (449 dozen) and 910 (735 dozen).[29] The purchase orders specified delivery dates between August 25 and October 1, 1958.

Between August 5 and October 22, 1958, the date of expiration of the 1958 coupon book (CX 24), Lipman, Wolfe purchased, under seven separate invoices, the relatively small quantity of 243 dozen pairs of hosiery, style numbers 510 (13 dozen), 519 (130.5 dozen), 603 (60.5 dozen) and 649 (39 dozen).[30] Only two of these style numbers, 519 and 603, correspond to the style numbers purchased by Fred Meyer and the volume accounted for by these styles amounted to only 191 dozen.

Relying *solely* upon the evidence that some of the hosiery purchased by Lipman, Wolfe bore the same style numbers as that purchased and featured by Fred Meyer, the Commission concluded that purchases of products of like grade and quality had been established. Thus, stated the Commission:

> A supplier's use of identical descriptive data on invoices to favored and non-favored customers con-

[28] CX 181-86.

[29] CX 157 A, 158 A, 159 A, 160 A, 161 A, 162 A, 163 A, 164 A, 165 A, 166 A, 167 A, 168 A, 169 A.

[30] CX 191-97.

stitutes probative evidence and establishes, prima facie, the fact of like grade and quality (R. 96).

There is, however, absolutely nothing in the record of this case which shows or suggests that Burlington's style numbers are indicative of grade or quality. Indeed, the evidence is to the contrary.

As noted above, the hosiery purchased and featured by Fred Meyer carried the private label "Rose Dawn" (R. 425). In connection with the coupon book promotions, Burlington agreed to grant allowances to Fred Meyer if, instead of purchasing the usual "seamless or seamfree construction", Fred Meyer would "write up other constructions", *i.e.,* other specifications as to grade and style (R. 428-29). This Fred Meyer did. On the purchase orders placed for the hosiery to be used in connection with the coupon book promotion there was written in longhand Fred Meyer's *own specifications* as to the grade and style of the hosiery.[31]

In view of the fact that Fred Meyer purchased hosiery under its own specifications, it cannot be presumed that this merchandise was of like grade and quality to the regular grades sold to other customers. It was the Commission's, not petitioners', burden to show that the specific compared products were, in fact, of like grade and quality. *Universal-Rundle Corp.,* Docket 8070, Initial Decision (October 28, 1963), p. 17, *aff'd,* 3 CCH Trade Reg. Rep., ¶16,948 (1964).

The Commission also erred in finding that Lipman, Wolfe made contemporaneous purchases from Burlington. As noted previously, price and other terms of sale of the hosiery purchased by Fred Meyer from Burlington for

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[31] A typical specification reads:

> Star Mist as Mistone, [sizes] 8½-9-9½-10-10½-11, Rose Dawn ¼ dz. pack individual clear [Rose Dawn] envelopes pressure sensitive label in lower right corner of each envelope showing construction [twin thread] our color, size, length and our retail (98¢) (CX 145 A, see also CX 141 A, 142 A, 143 A, 146 A, 147 A, 148 A, 157 A, 158 A, 159 A, 160 A, 161 A, 162 A, 163 A, 164 A, 165 A, 166 A, 167 A, 168 A, 169 A).

the 1957 promotion were agreed upon in March 1957 (R. 426-27). At the same time, Burlington offered Fred Meyer advertising and promotional allowances of 50 cents to 94 cents per dozen, depending upon the hosiery style involved (R. 429). Purchase of the promoted hosiery is reflected by seven purchase orders dated May 29 and 31, 1957 (CX 141 A, 142 A, 143 A, 145 A, 146 A, 147 A, 148 A). However, there is absolutely no evidence of the terms of sale or allowances granted or offered to Lipman, Wolfe in March 1957, when the arrangements were made, or in May 1957, when the purchase orders were placed. Indeed, there is no evidence that Lipman, Wolfe was even a customer of Burlington in those months, *i.e.*, that Lipman, Wolfe was purchasing hosiery from Burlington in March or May 1957, or at any time proximate thereto. The earliest evidence of purchases by Lipman, Wolfe from Burlington in 1957 is an invoice dated July 17, 1957 (R. 440; CX 181). The most that can be said, therefore, is that Lipman, Wolfe, between July 17 and October 23, 1957, the date of expiration of Fred Meyer's 1957 coupon book (CX 4), purchased under six separate invoices, a comparatively minor total of 388.5 dozen pairs of hosiery (CX 181-86).

Since Lipman, Wolfe's first 1957 purchase evidenced by the record occurred at least four months subsequent to the time the arrangements were made between Burlington and Fred Meyer and approximately two months subsequent to the date of Fred Meyer's purchase orders, it is obvious that the requirement of contemporaneous sales is lacking with regard to the 1957 coupon book promotion.

The same is true with regard to the 1958 promotion. The terms of sale of Burlington's hosiery for the 1958 coupon book promotion were agreed upon in the spring of 1958 (R. 433-34). Fred Meyer placed eleven purchase orders on June 2, 1958, one order on June 4, 1958, and one on August 6, 1958 (CX 157 A, 158 A, 159 A, 160 A, 161 A, 162 A, 163 A, 164 A, 165 A, 166 A, 167 A, 168 A, 169 A).

Each order specified delivery of the merchandise between August 25 and October 1, 1958.

The first 1958 purchase by Lipman, Wolfe from Burlington shown by the record was on August 5, 1958 (CX 197). Between August 5, 1958, and October 22, 1958, the date of expiration of the 1958 coupon book, Lipman, Wolfe purchased, under seven separate invoices, the relatively minor quantity of 243 dozen pairs of hosiery from Burlington (CX 191-97). Thus, while the price and terms of sale of the merchandise purchased by Fred Meyer for use in its 1958 promotion were established in the spring of 1958 (R. 433-34), the evidence as to purchases by Lipman, Wolfe is simply that a purchase was made on August 5 and that other purchases followed. In short, there is absolutely no evidence of the prices or allowances offered to Lipman, Wolfe by Burlington in the spring of 1958 or indeed, that Lipman, Wolfe even purchased during that part of the year. Certainly, this evidence cannot support a finding, essential to the Commission's conclusion, that contemporaneous sales occurred.

Furthermore, while it is, of course, elementary that in order to prove a violation of section 2(d) it must be shown that the supplier charged with treating customers discriminatorily did, in fact, grant one customer promotional allowances which were disproportionate to those granted or offered another, this has not been established.

Section 2(d) makes it unlawful for a supplier "to pay or contract for the payment of" promotional benefits when such benefits are not offered on proportionally equal terms to all other competing customers. Burlington contracted to pay Fred Meyer promotional allowances in or about March of 1957 and 1958 but there is no evidence of Burlington's prices, terms, or offers to Lipman, Wolfe at that time. The evidence merely indicates that Lipman, Wolfe did not receive an *actual* payment of cooperative advertising or promotional allowances from Burlington during the period August to December 1957 (R. 444-45, 456-57). Asked whether Lipman, Wolfe was offered *cooperative advertis-*

ing funds during the limited period of September to October, 1957, the witness from that company replied "I don't think so" (R. 445). There is no evidence, however, that Burlington failed to offer some form of promotional assistance other than cooperative advertising during the relevant time period.

Furthermore, even assuming that Burlington did not offer Lipman, Wolfe proportional benefits during the specific period of Fred Meyer's promotions, this alone does not establish that Lipman, Wolfe was discriminatorily treated. In its Guides For Advertising Allowances And Other Merchandising Payments and Services, the Commission itself explains:

> No single way to proportionalize is prescribed by law. *Any method* that treats competing customers on proportionally equal terms may be used. *Generally, this can best be done by basing the payments made or the services furnished on the dollar volume or on the quantity of goods purchased during a specified time* (Emphasis added).[32]

Thus, if all customers of a supplier are treated proportionally during a "specified time", no violation can be found. And the "best" method of assuring proportionality is by reference to total dollar volume of sales or total quantity of goods sold. Although the Commission does not explain in its Guides exactly what is meant by "specified time", it is petitioners' contention that a calendar year, for example, can be so considered. Indeed, it appears that the Second Circuit has so held. In *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission,* 311 F.2d 480 (2d Cir. 1962), the Court, without concerning itself with the specific time promotional payments were made, found disproportionality simply because *total* promotional payments granted during the *year* 1958 "gave Weingarten 3.4% and Childs 2.2% on respondent's *gross*

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[32] 1 CCH Trade Reg. Rep., ¶3980, p. 6076.

sales to them'', while the ''percentages for the other customers, who received no special allowance, ranged from 1.9% to zero'' (*Id.* at 483; emphasis added).

Therefore, in order to conclude that Burlington did, in fact, discriminate in terms of promotional benefits granted to Lipman, Wolfe vis-a-vis Fred Meyer, the evidence must show that Lipman, Wolfe, was discriminated against during the relevant periods of time, *i.e.,* during the years 1957 and 1958. However, the record in this case is totally void of evidence as to Burlington's total dollar volume of sales, or total quantity sold, to Lipman, Wolfe during either of these years (R. 443-44).[33] Nor, is there evidence as to the total receipts of Lipman, Wolfe of promotional allowances from Burlington during 1957 or 1958. It is obvious, therefore, that, absent such evidence, there is no way to determine whether or not Burlington actually treated Lipman, Wolfe disproportionately.

Finally, it is a logical presumption, in view of the extremely large quantity of hosiery purchased by Fred Meyer for the coupon book promotions, that Burlington realized substantial cost savings in its sales to Fred Meyer as compared to sales of substantially lower quantities to Lipman, Wolfe. It was Commission counsel's burden to refute this presumption by specific and exact evidence; this burden was not met.

The failure to adduce such evidence precludes a finding that petitioners knew, or should have known, that cost savings were nonexistent. Since this issue relates directly to the question of petitioners' "guilty knowledge", it is treated in the portion of this brief pertaining to the alleged section 2(f) violation by petitioners (see *infra,* pp. 66-78).

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33 Commission counsel did not introduce evidence relating to total dollar volume or total quantity of sales by Burlington to Lipman, Wolfe for 1957 or 1958. As noted above, the earliest evidence relating to Burlington's sales to Lipman, Wolfe for 1957 is an invoice dated July 17, 1957 (R. 440; CX 181). Similarly, the first invoice introduced in evidence for 1958 is dated August 5, 1958 (CX 197).

2. Cannon Mills Company

Cannon Mills is alleged to have violated sections 2(a) and 2(d) only with respect to its participation in Fred Meyer's 1956 coupon book promotion. Cannon Mills participated in the 1956 coupon book promotion by granting a 10 cent per dozen allowance on the merchandise purchased for feature and resale during the promotion (CX 114). The 1956 coupon book featured Cannon fingertip towels, which regularly sold for 23 cents each, at "7 for $1.00" (CX 1, p. 37). As the Commission found, the allowance granted petitioners, $750 (R. 69), did not fully compensate for the total amount by which they in turn reduced the resale price of the towels to consumers (R. 68-69).

The only customer which Cannon Mills is alleged to have discriminated against is Roberts Brothers, a retail department store in Portland (R. 83),[34] and the only product which the Commission claims was sold to Fred Meyer by Cannon Mills in violation of the law was "fingertip" towels, of which 7500 dozen were purchased for resale during the 1956 coupon book promotion. These towels, designated as style number 7205-AS, were purchased in March 1956 (5,500 dozen) and October 1956 (2,000 dozen), (CX 119-22, 126-29).

During 1956, Roberts Brothers made three purchases of Cannon fingertip towels, style number 7205-AS (CX 136-39). These purchases, reflected by invoices dated April 12, June 19, and November 15, 1956, totaled only 600 dozen (CX 136-39).

While Cannon Mills' style number on the merchandise purchased by Fred Meyer is the same as that on the merchandise purchased by Roberts Brothers, there is no evidence indicating that the style number was intended to be, or was in fact, indicative of the grade or quality of the towels.

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[34] The Commission in its "Opinion on Exceptions to Proposed Order" erroneously stated that Lipman, Wolfe & Co., rather than Roberts Brothers, was the allegedly disfavored customer of Cannon Mills (R. 150).

Commission counsel unsuccessfully attempted, through the testimony of the Roberts Brothers' witness, to establish like grade and quality, as follows:

> Q. Mr. Miller, I direct your attention to Commission Exhibit 1, Page 37, and ask you if you recognize the fingertip towel? [35]
>
> A. Well, I recognize the towel design, *but as to quality I don't* (R. 385; emphasis added).
>
> * * *
>
> Q. Now, there are items that go to make up the desirability of a towel involving the towel, and its marketability, such as color and weight and border, and the like, are there not, Sir? Those items go to determine whether the customer will buy that towel then?
>
> A. That basically makes up the towel.
>
> Q. Those are the basic things, and those items you can't tell at all by looking at the photograph, can you, sir, which was shown you more closely?
>
> A. No, *the photograph is not evidence of the same item.* I can't say that (R. 390; emphasis added).

There is no other evidence. Yet, the question of like grade and quality is susceptible of exact and specific proof.

Furthermore, it cannot be found that Roberts Brothers competed in the resale of goods of like grade and quality during the relevant time period, *i.e.,* during the period of the 1956 coupon promotion, as there is no evidence indicating that Roberts Brothers even offered fingertip towels for resale at that time. Indeed, the only reasonable inference is to the contrary. On April 12, June 19 and November 15, 1956, Roberts Brothers purchased 200 dozen towels (CX 136-39). The April and June purchases occurred approximately five and three months prior to the promotion, respectively, and the November purchase, of

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[35] This exhibit is the 1956 coupon book. The fingertip towels purchased and featured by Fred Meyer in the 1956 promotion were described in the coupon book as follows:

> All first quality thick absorbent terry. Fringed ends, 8 home decorator colors. Ideal as guest towels, extra large wash cloths (CX 1, p. 37).

course, was made approximately one month after the promotion ended. In view of the small quantity purchased on those occasions, it cannot be reasonably inferred that Roberts Brothers stocked, handled, or resold the fingertip towels during the period of the promotion in competition with Fred Meyer.

Finally, any differential which may have been accorded by Cannon Mills to Fred Meyer, even assuming contemporaneous sales of like grade and quality towels to Roberts Brothers occurred, was cost justified. Although the Hearing Examiner in this case, on the basis of "the invoices of both Fred Meyer, Inc. and Roberts Brothers" found that no cost savings had been realized in connection with the sale to Fred Meyer, the same Examiner found, in a proceeding charging Cannon Mills with a violation of section 2(a) by granting the very allowance here in question, on the basis of voluminous cost justification evidence adduced by Cannon Mills, that the price difference was fully cost justified and directed dismissal of the complaint. *Cannon Mills Company,* Docket 7494, Initial Decision (December 3, 1963).[36]

Consequently, there exists no basis for a finding that Cannon Mills violated the law or for the inference drawn by the Commission that Fred Meyer had reason to believe that the prices received from Cannon Mills were not cost justified. An inference cannot be indulged where it is totally contrary to a proven fact (see complete discussion of this question *infra,* pp. 66-78).

3. Tri-Valley Packing Association

Tri-Valley is alleged to have discriminated against Hudson House, Inc., a wholesale grocery firm (R. 243) by reason of its participation in Fred Meyer's 1957 coupon

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[36] The dismissal of the complaint was affirmed by the Commission on the ground that injury to competition had not been shown. The Commission did not, therefore, reach the cost justification issue. *Cannon Mills Company,* 3 CCH Trade Reg. Rep., ¶16,878 (1964).

book promotion. This is the only transaction challenged by the Commission with regard to Tri-Valley (R. 66-67, 97).[37]

A page in Fred Meyer's 1957 coupon book offered consumers one can of Tri-Valley-packed "My-Te-Fine" yellow cling sliced or halved peaches without cost with the purchase of two cans of the same merchandise (CX 4, p. 60). In consideration for having its peaches advertised and promoted by Fred Meyer in connection with the 1957 coupon book promotion, Tri-Valley agreed to pay $350 for a coupon page and to redeem each coupon submitted by consumers at the current price during the period of the promotion (CX 21).[38]

During September and October 1957, Fred Meyer received, pursuant to previous agreement, 2,200 cases of its private label "My-Te-Fine" fancy sliced and halved peaches for sale during the promotion period (CX 44-47). During the same two months, Hudson House purchased, under its own private label, 175 cases of identically described merchandise (CX 42A-43B).[39] Thus, although both Fred Meyer and Hudson House purchased what appears to be the same product at about the same time, the evidence shows that this very well may not have been the case. There are many grades of "fancy peaches" which are not shown by the invoices of record (R. 260). These grades range from low to middle to high (R. 215), and the grade and quality of peaches varies depending upon the area in which they are grown (R. 252). In this regard, Mr. Rice, Vice President and Manager of the Wholesale Division of Hudson House, testified at some length as to variations in grade within the general classification "fancy" (R. 252-253).

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37 Tri-Valley's participation in Fred Meyer's 1957 coupon book promotion has previously been considered by this Court in *Tri-Valley Packing Association v. Federal Trade Commission*, 329 F.2d 694 (9th Cir. 1964).

38 Pursuant to this agreement, Tri-Valley redeemed 20,750 coupons at 23.2 cents each (CX 26).

39 Hudson House also purchased $918 worth of peaches in other sizes and at other prices during the same period (CX 42-43).

Thus, although the grade and quality of peaches differs depending upon the geographic area in which they are grown (R. 252), the Commission failed to adduce any evidence showing that the Tri-Valley products purchased by Fred Meyer and Hudson House were grown and produced in the same area. Indeed, the witnesses from Tri-Valley were not asked a single question regarding the grade and quality of the peaches sold to Fred Meyer as compared to those sold to other Portland area customers.

Disregarding this lack of evidence, however, the Commission found that like grade and quality of products had been proved since "the independent retailers who competed with respondents had no doubts on the like grade and quality issue" (R. 96). This statement is completely unsupported by the record. Witness Denfield, a retail grocer who purchased peaches from Hudson House, and whose testimony is relied upon by the Commission in sole support of its finding, testified merely that the peaches purchased by him were "just peaches" which "[o]rdinarily may *not* have the same grade in all the cans, that's what I have found" (R. 656; emphasis added).

Six other retail grocers appeared, but nothing in their testimony supports the Commission's conclusions concerning the issue of like grade and quality.[40] To the contrary, this testimony destroys any basis for such a conclusion. While these witnesses testified generally that they purchased peaches and other products, they did not testify that the specific products they purchased were of like grade and quality to products stocked or sold by Fred Meyer. Obviously, they could not so testify in light of the complete failure of Commission counsel to trace to their shelves canned peaches sold by Tri-Valley to Hudson House, their wholesaler (see *infra,* pp. 58-60).

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[40] The retail witnesses called by Complaint counsel were: Meyer (R. 292, et seq.); Jones (R. 509, et seq.); Johnson (R. 520, et seq.); Girod (R. 538, et seq.); Denfield (R. 633, et seq. and R. 652, et seq.); and Griffith (R. 659, et seq.)

Furthermore, while representatives of Tri-Valley appeared as witnesses, their testimony also fails to substantiate the claim that the product purchased by Fred Meyer was of like grade and quality to products purchased by the allegedly disfavored wholesale customer, Hudson House.[41]

However, even assuming that the evidence establishes like grade and quality, there can still be no finding of the violation charged. Since Hudson House is a wholesaler and does not compete functionally with Fred Meyer, it was incumbent upon the Commission to find, under this Court's decision in *Tri-Valley, supra,* "that the independent retailers served by Hudson House were 'indirect' customers of Tri-Valley" (329 F.2d at 710). This has not been established.

Proof is also lacking that Hudson House's customer-retailers stocked for resale the relevant products during the pertinent time period. Indeed, the Commission so admits:

> . . . cans of peaches . . . labeled "Hudson House" . . . can be physically found sitting on the shelves of retailers who compete with respondents, *but it cannot be said with absolute certainty that any particular one of those cans was actually packed by Tri-Valley . . . or any other specific supplier* (R. 94; emphasis added).

Contrary to the Commission's holding, the fact that Hudson House's customer-retailers actually stocked and resold Tri-Valley products during the relevant time period cannot be inferred. The error in so inferring is emphasized and fully demonstrated by reference to Hudson House's operations.

Hudson House purchases peaches from a number of companies other than Tri-Valley (R. 249). Additionally, Hudson House operates its own cannery (R. 249). The Vice President of Hudson House testified that his company has purchased peaches from Flotill, Burkhardt-Richards, Ball,

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[41] See testimony of Tri-Valley representatives Snyder (R. 551, et seq.), and Bare (R. 567, et seq.).

Tri-Valley, and Washington Co-op (R. 249). Altogether, Hudson House carries 42 or 43 different peach items (R. 251). There is no evidence indicating whether the peaches purchased by any of Hudson House's retail customers who testified in this case were packed by Tri-Valley, by some other Hudson House source, or by Hudson House itself. Since private label goods are involved, this information is obtainable only by tracing specific shipments of peaches to the customer-retailers of Hudson House alleged to be in competition with Fred Meyer and showing that these specific shipments had been packed by Tri-Valley. Not only is this evidence totally lacking but Hudson House's Vice President testified that he was even unable to say that *any* of the products sold to Hudson House by Tri-Valley were ultimately resold to *any* customer in the Portland area (R. 255-56).

The testimony of the retail customers of Hudson House which allegedly competed directly with Fred Meyer further emphasizes the impossibility of, and error in, inferring the existence of requisite competition. Mr. Jones, for example, testified that he purchased peaches from Hudson House under the brand names "Hudson House" and "Dundee" (R. 510). He did not, however, identify the specific grade or quality of the peaches or the period of time when he stocked and resold these peaches. Nor is there any evidence which even suggests that the peaches which Jones purchased from Hudson House were supplied by Tri-Valley.

Mr. Girod, another retailer, testified merely that he purchased peaches from Hudson House under "Hudson House", "Standby" and "Del Monte" labels (R. 543-44). He did not identify the specific grade or quality of the peaches which he handled. Nor is there any evidence indicating that any of the peaches which he did handle were purchased by Hudson House from Tri-Valley.

Similarly, Mr. Griffith, another retailer, testified that he purchased peaches from Hudson House, but did not identify the specific grade or quality of these peaches (R. 660).

He admitted that he did no business with Tri-Valley and did not know whether Hudson House had purchased the peaches which he handled from Tri-Valley (R. 669).

Another retailer, Mr. Denfield, testified that he purchased peaches from Hudson House, but he did not identify the dates, grade or quality of such purchases (R. 638, 658). Naturally, Mr. Denfield was in no position to know from whom Hudson House purchased the peaches which were resold to him.

There is, therefore, absolutely nothing in the record of this case which would permit the tracing of products sold by Tri-Valley to the shelves of the customer-retailers of Hudson House. This failure of proof requires dismissal of the complaint as to Tri-Valley.

4. Idaho Canning Company

Idaho Canning Company is alleged to have violated sections 2(a) and 2(d) only with respect to its participation in Fred Meyer's 1957 coupon book promotion. Two customers of Idaho Canning, both wholesalers, are alleged to have been discriminated against: Hudson House and Wadhams & Co.

Idaho Canning's participation in the promotion consisted of a payment of $350 for a coupon book page, plus redemption of 21,367 coupons at 12.1 cents each (CX 16). The total payment of Idaho Canning was made to Fred Meyer in the form of free goods (CX 16; see also CX 39, 205-07, 209-10). Pursuant to agreement between the parties, Fred Meyer's 1957 coupon book offered a one pound can of Fred Meyer's private label "My-Te-Fine" whole kernel or cream style corn free with the purchase of two cans at the regular price of 15 cents per can (CX 4, p. 61).

In connection with this supplier, the decision of this court in *Tri-Valley, supra,* is dispositive. Neither of the allegedly disfavored customers compete with Fred Meyer within the meaning of section 2(d) as both are wholesalers and operate at different functional levels than does Fred

Meyer. Therefore, as this Court ruled in *Tri-Valley,* there must be a showing that the retail customers of such wholesalers were "indirect" customers of Idaho Canning and that such retail customers actually stocked, handled and resold the relevant products in actual competition with Fred Meyer. Commission counsel, however, made no attempt to show, and the Commission did not find, that Idaho Canning engaged in such a course of direct dealing with these customers as to establish, in any sense, requisite "indirect" customer relationships. Nor, has it been established that any retail customer of the wholesalers actually stocked, handled or resold the relevant products of Idaho Canning. Indeed, the Commission admits that the proof in this respect is deficient (R. 94).

With respect to the alleged section 2(a) violation, the evidence establishes that Idaho Canning realized substantial cost savings by reason of the large volume sales of the featured products to Fred Meyer which were not realized on sales to the two wholesalers. Such evidence, standing unrebutted, precludes a finding that petitioners knew or should have known that they were receiving unjustified price concessions. This issue relates directly to the question of petitioners' "guilty knowledge" and is treated fully hereafter (see *infra,* pp. 66-78).

5. Philip Morris Company

In addition to the foregoing evidence which relates to the coupon book promotions, the Commission made certain findings concerning transactions with Philip Morris Company. These transactions involve alleged violations by Philip Morris of section 2(d) and are challenged under Count II of the complaint. It is not charged that Philip Morris granted price discounts in violation of section 2(a) or that Fred Meyer received discounts in violation of section 2(f).

The promotional payments made to Fred Meyer by Philip Morris which are challenged under Count II include: (1) $500 for participation in Fred Meyer's 1956

"Gift Days" promotion; (2) \$150 per month during a portion of 1956; (3) \$800 paid on October 24, 1956 as consideration for the promotion of Parliament cigarettes during September 1956; and (4) \$400 for participation in Fred Meyer's "Thrift Days" promotion in 1957 (R. 47-48). It is alleged that, in granting such promotional allowances, Philip Morris discriminated against two alleged competitors of Fred Meyer, *viz.,* Oregon Piggly Wiggly Company, a retail grocery chain, and United Grocers, Inc., a wholesaler-cooperative.

As to United Grocers, Philip Morris was not obligated to offer promotional benefits proportional to those granted Fred Meyer since United Grocers is a wholesaler and does not compete functionally with Fred Meyer (see *supra,* p. 28).

Furthermore, petitioners contended before the Commission that the two allegedly disfavored customers of Philip Morris received a number of promotional payments during the years 1956-1958 and that since the record is silent as to the comparative volume of purchases by Fred Meyer and the two allegedly disfavored customers, no finding could be made as to disproportionality. Evading this contention, the Commission merely held that the allegedly disfavored customers received only "regular" promotional allowances while Fred Meyer received "special deals" in addition to regular allowances and that since these "special deals" were not affirmatively offered to the allegedly disfavored buyers they were not "available". The Commission further found that even had they been "available", the benefits were "virtually incapable of being offered on 'proportionally equal' terms" (R. 76-77). The Commission erred in so concluding.

The record contains invoices and other documents which indicate that Philip Morris sold various products to United Grocers and Oregon Piggly Wiggly, including "Marlboro", "Marlboro Filter", "Philip Morris", "Philip Morris Longs" and "Benson & Hedges" (*e.g.,* CX 98B, 99B, 100B, 101B, 102B, 108B, 109B, 110B, 111B, 112B). However, the record contains no invoices or other documents showing the sale of any of the foregoing products to Fred Meyer during the years 1956, 1957 or 1958. Thus, the Commission concedes that ". . . the record is silent as to the comparative volume of purchases by respondents on the one hand and those two non-favored buyers on the other . . ." and that "it is impossible to determine whether or not Philip Morris fairly apportioned its promotional money among them" (R. 76).

Nevertheless, the Commission inferred that a violation occurred on the basis of its "regular" versus "special" benefits theory. That actual disproportionality cannot be inferred, however, is obvious.

United Grocers received promotional payments from Philip Morris of $405 in March 1956, $300 in July 1956 and an unknown amount in September 1956 (R. 605-08). In addition, United Grocers received an allowance of 5 cents per carton beginning on February 6, 1956 on Philip Morris long-size cigarettes and 10 cents per carton beginning on July 5, 1956 on Parliament cigarettes (R. 615-16). On August 5, 1956, Philip Morris granted United Grocers a $6.00 per case promotional allowance on Spud cigarettes (R. 617). There is no indication either of United Grocers' total purchases or of its total promotional receipts.

As to Piggly-Wiggly, the witness from that Company was asked by commission counsel prior to his testimony to search his records for payments made to him by Philip Morris. However, the request was narrowly confined to a search with respect to payments in one month of each of two years, namely, September 1956, and April 1957 (R. 307-08; see also R. 319). He testified that on March 25, 1957, Piggly-Wiggly entered into a promotion agreement with Philip Morris in connection with which Piggly-Wiggly retail customers received a six-pack carton of Pepsi-Cola with each carton of cigarettes and that Philip Morris reimbursed Piggly-Wiggly for the cost of the Pepsi-Cola given away. The payment by Philip Morris was $357.75 (R. 309-10). Significantly, this compares favorably with the $400 payment found by the examiner to have been made by Philip Morris to Fred Meyer in April 1957 (R. 48). Of course, the record does not show the volumes purchased by either Fred Meyer or Piggly-Wiggly, and, therefore, a determination as to whether the $357.75 payment to Piggly-Wiggly as compared to the $400 payment to Fred Meyer was proportional is impossible. However, since Fred Meyer is one of the major retailers in the Portland area and probably enjoys a substantially greater volume than Piggly-Wiggly (CX 363, p. 7), it would be a fair guess that Piggly-Wiggly obtained much better treatment than Fred Meyer. In other words, Piggly-Wiggly received almost as much in dollars from Philip Morris as Fred Meyer although Fred Meyer's purchases were, in all probability, substantially greater. This, of course, is an inference. But it certainly precludes an inference to the contrary, *i.e.,* that Piggly-Wiggly did not receive proportional treatment from Philip Morris.

Moreover, the witness from Piggly-Wiggly admitted that if he had checked his records for payment by Philip Morris in months other than the one month in each year requested by commission counsel, he might have found additional promotional payments by Philip Morris (R. 318-19). Additionally, the time he was given to check his records was short, the Company had just moved their offices, and he had difficulty locating records (R. 319). Although the witness was the General Manager of Piggly-Wiggly (R. 293), he had no personal contact with representatives of Philip Morris; all such contacts were handled by other personnel in the organization (R. 310). Therefore, the witness testified that he had no knowledge other than the fragmentary evidence disclosed by the very limited search of his records (R. 316-17, 318-19).

There is, therefore, no evidentiary basis for determining whether or not promotional allowances paid to Fred Meyer by Philip Morris were accorded or offered on proportionally equal terms to the allegedly disfavored customers.

Nor is there any merit or proper basis in fact for the Commission's classification of Philip Morris' promotional payments into "regular" and "special" categories. "Regular" allowances offered by Philip Morris, stated the Commission, were those consisting of a particular amount per case purchased, and were directly related to the volume of purchases. "Special deals," on the other hand, stated the Commission, were offers of flat sum payments for specific promotional services performed (R. 77-79). The mere fact, the Commission therefore concluded, that Fred Meyer received "special" allowances and that the allegedly disfavored customer received "regular" allowances, establishes a section 2(d) violation.

Certainly, this is not the law. Proportionalization must be determined by a review of all relevant facts and, as a practical matter, cannot be inferred when there is so much as a possibility that all customers were treated equally in terms of total payments related to total purchases. In short, payment to Fred Meyer of the same amount in "special" allowances as payments of "regular" allowances to other customers would not constitute a *per se* violation of section 2(d). Rather, in order to find such a violation, Commission counsel was required to prove that Fred Meyer in fact received a greater amount, qualitatively or quantitatively, than did other customers. This, of course, has not been proved.

Commission counsel failed to introduce in evidence any cooperative advertising or promotional contracts offered by Philip Morris Company. Copies of Philip Morris' cooperative advertising and promotional arrangements are kept in that company's New York office. This is true of both "regular" and "special" deals (R. 535). However, no witness was called from the New York office, and the Commission made no attempt to obtain this evidence. Thus, even if relevant sales information showing the volumes purchased by the allegedly favored and disfavored customers were in evidence, it would still be impossible to determine whether or not the allegedly discriminatory payments made to Fred Meyer were within the terms of the contracts and promotional programs offered by Philip Morris Company to all of its customers.

For all of the foregoing reasons, it must be concluded that the Commission erred in finding that Philip Morris violated section 2(d) in its dealing with Fred Meyer.

V. THE COMMISSION ERRED IN FINDING THAT PETITIONERS KNEW OR HAD REASON TO KNOW THAT THE ALLEGEDLY DISCRIMINATORY PRICES AND PAYMENTS RECEIVED WERE UNLAWFUL.

A. The Alleged Section 2(f) Violations

The Commission's findings of fact are not supported by substantial reliable and probative evidence as required by the Administration Procedure Act, *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951), and the Commission has applied erroneous legal principles.

Section 2(f) of the Clayton Act makes it illegal for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section" (15 U.S.C. §13(f)). A buyer's liability, therefore, must be predicated upon a finding that one or more suppliers did, in fact, violate section 2(a) of the Act. Assuming such violations are shown (which petitioners deny has been done here) the Commission is required further to prove that the buyer knew or had reason to know that the price received was discriminatory and did not fall within one or more of the 2(a) defenses available to a seller.

The Commission's burden of proof under section 2(f) was defined by the Supreme Court in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61 (1953). There, Automatic Canteen, which held "a dominant position" in the sale of confectionery products through vending machines, solicited and received prices *which it knew* were as much as 33 percent lower than prices quoted by its suppliers to other purchasers.

The Commission held that a *prima facie* case of violation could be inferred from mere proof that the buyer had received such lower prices on like goods "well knowing that it was being favored over competing purchasers" (346 U.S. at 62). This, ruled the Supreme Court, was error. Rather, the Court squarely held, a buyer may *not* be held liable under 2(f) unless the Commission proves a *prima facie* violation of 2(a)—interstate commerce, sales at discriminatory prices, and reasonable probability of injury to competition—and further proves that the lower price which the buyer received was not within one of the seller's defenses, such as cost justification. Still further, if the lower price received by the buyer is "not known by him [the buyer] not to be within one of those defenses" no violation can be found (346 U.S. at 74).

Thus, the Court in *Automatic Canteen* set extremely rigid standards as to the burden of proof which the Commission must carry to find a violation of 2(f). Aside from the technical question of statutory construction, the Court was motivated to vest this extremely heavy burden on the Commission because of the basic conflict between the Robinson-Patman Act and the Sherman Act. Thus, the Court stated that bargaining between buyers and sellers is dictated by broader antitrust policies, and that it was its duty to try to reconcile Robinson-Patman Act interpretations with such "broader antitrust policy". The Court noted that "the Commission has, by virtue of the Robinson-Patman Act, been given some authority to develop policies in conflict with those of the Sherman Act" but made it equally clear that it would not approve liberal statutory interpretation to foster the "engendering of such a conflict" because "simplified enforcement" might "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at 63, 74).[42]

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[42] See also, Report of Attorney General's National Committee to Study the Antitrust Laws (1955), p. 196.

In defining the Commission's burden of proof, the Court recognized that "trade experience in a particular situation might afford a sufficient degree of knowledge to provide a basis for prosecution" (346 U.S. at 80). For example, if the Commission shows that a buyer knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion, the buyer might fairly be charged with notice that a substantial price differential cannot be cost justified. The Commission must prove, however, that the buyer actually knew that the methods by which he was served and the quantities in which he purchased were the same as other buyers. On the other hand, if the methods or the quantities differ, the Commission must show that such differences did not give rise to sufficient savings in the cost of manufacture, sale and delivery to justify the price differential and that the buyer knew or should have known such fact. The Supreme Court also held that the Commission might infer, from a showing that the actual cost savings were very small compared with the price differences, that the buyer could not reasonably have believed that the differentials were justified.

In the present case, the Commission failed to meet its burden of proof, as defined in *Automatic Canteen,* in at least five respects:

1. The Commission did not attempt to prove and the record contains no evidence which would support a finding that Fred Meyer, "knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices" (346 U.S. at 79).

2. The Commission failed to prove that the allegedly disfavored buyers purchased in the same quantities as Fred Meyer.

3. The Commission failed to prove that the allegedly disfavored buyers purchased in the same manner and with

the same amount of exertion on the sellers' part as Fred Meyer.

4. The Commission failed to prove that the cost savings on sales to Fred Meyer were small as compared to the alleged price differences. Nor did it attempt to prove that such cost differences could not reasonably have been thought to justify such differentials.

5. The Commission failed to prove that the effect of the alleged price differences "may be substantially to lessen competition or tend to create a monopoly," as required under section 2(a).

1. There is No Evidence of "Pressure" or "Coercion"

The Commission did not contend and there is no evidence which would support a finding that Fred Meyer, "knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices'' (346 U.S. at 79).

Proof that a buyer coerced its suppliers to grant price concessions may well estop the buyer from claiming that it lacked knowledge or reason to believe that the concessions received were unlawful. Such inducement of concessions would obviously have occurred under circumstances which rendered the buyer's claimed lack of knowledge culpable. Thus, in *American News Co.* v. *Federal Trade Commission,* 300 F.2d 104, 107 (2d Cir. 1962), the court found liability on the part of a buyer for the inducement and receipt of promotional allowances and rebates after noting that the buyer had ''threatened to discontinue handling a publication if its publishers refused to comply". There is no such evidence in this case, or even a suggestion of such.

2. The Quantities Purchased By The Allegedly Favored And Disfavored Customers Were Substantially Different

The Supreme Court, in *Automatic Canteen,* held that where the quantities purchased are not the same, or at least substantially the same, the Commission may *not* infer that a buyer who receives an allegedly illegal price discrimination has reason to know that the differential could not be cost justified by his supplier. The Commission has ignored entirely this holding and the relevant evidence.

As to Burlington, for the 1957 and 1958 coupon book promotions, Fred Meyer purchased 1,743 and 4,308 dozen pairs of hosiery, respectively (CX 141A-48B, 158A-68B). Of the 1,743 dozen 1957 purchase, 580 dozen were ordered on May 29, 1957, and 1,163 dozen were ordered on May 31, 1957 (CX 141A-48B). Compared to this, Lipman, Wolfe purchased a total of only 624 dozen pairs between July 17 and November 19, 1957 (CX 181-89).[43] Lipman, Wolfe, therefore, over a four-month period, purchased only about one-third the quantity ordered in two days by Fred Meyer. Moreover, the individual purchases by Lipman, Wolfe were extremely small compared to the two large orders by Fred Meyer, ranging from 28 dozen to 187.5 dozen, the majority of which were in quantities of less than 100 dozen (CX 181-89).

Similarly, for the 1958 promotion, Fred Meyer purchased 4,308 dozen pairs of hosiery, 3,775 dozen of which were ordered on June 2, 1958 (CX 158A-168B).[44] In comparison, Lipman, Wolfe's total 1958 purchases reflected by the record amounted to only 354.5 dozen over a period of three months,[45] and individual purchases ranged from 16.5 dozen

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[43] There is no evidence as to purchases by Lipman, Wolfe prior to July 17, 1957.

[44] Fred Meyer also ordered 350 dozen on June 4, 1958, and 183 dozen on August 6, 1958 (CX 157A-B, 169A-B).

[45] The record does not show Lipman, Wolfe's purchases prior to August 5, 1958.

to 111.5 dozen, only one being in excess of 100 dozen (CX 190-97).

Similarly, with regard to Cannon Mills, Fred Meyer purchased 7,500 dozen fingertip towels for the 1956 coupon promotion, 5,550 dozen being purchased by one order in March for delivery later in the year, and 2,000 dozen being purchased by one order in October (CX 119-22, 126-29). In comparison, the allegedly disfavored customer, Roberts Brothers, purchased only 600 dozen fingertip towels during the entire year 1956, the total consisting of three purchases of only 200 dozen each (CX 136-39).

The substantial difference in the quantity purchased by Fred Meyer from Cannon Mills as compared to the purchases of Roberts Brothers clearly precludes a finding that Fred Meyer knew or should have known the concession received was not justified. Subsequent to the Commission's decision in the instant case, Cannon Mills affirmatively proved, in a proceeding against it, that its price to Fred Meyer was more than cost justified (see *infra*, pp. 76-77).

Likewise, in a single order, Fred Meyer purchased 3,967 cases of cream style and whole kernel corn from Idaho Canning for the 1957 coupon promotion (CX 57). This compares to a total of only 2,200 cases of the same items purchased on six different occasions by Hudson House during the three month period August to October 1957 (CX 50, 51, 58, 60, 62, 65), and to only 80 cases total purchased on three different occasions during August and September by Wadhams (CX 52, 53, 59).

From Tri-Valley, Fred Meyer purchased 1,500 cases of peaches for the 1957 promotion, all of which were shipped and invoiced on the same day (CX 45, 46).[46] In comparison, Hudson House purchased during October a total of only 275 cases of the same items, the largest order being only 200 cases (CX 42A-43B).

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[46] Fred Meyer also purchased 400 cases of peaches on October 10, 1957 and 300 cases on October 29, 1957 (CX 44, 45).

In light of the *Automatic Canteen* holding that "no inference of guilty knowledge" is permissible unless the evidence shows that the alleged favored and disfavored customers purchased in substantially the same quantities, Count I of the complaint must be dismissed.

3. The Methods Of Serving And Amount Of Exertion On The Part Of Suppliers In Connection With Sales To Fred Meyer And The Allegedly Disfavored Customers Differed

The Commission has also ignored the fact that the allegedly disfavored customers of each supplier involved purchased in a different manner and with a different amount of exertion on the seller's part than did Fred Meyer. Agreements as to terms of sale and products to be featured during the coupon promotions were reached many months in advance of the promotion itself (R. 193-44, 208, 359-60, 427, 433-34, 553, 587, CX 119-22) and Fred Meyer took delivery shortly before or during the promotional period (CX 44-47, 49, 54-57, 61, 64, 66, 119-22, 141A-48B, 157A-69B). The allegedly disfavored customers, on the other hand, made small spot purchases for immediate delivery. This fact alone provides a most reasonable basis for petitioners to have believed that sellers could realize cost savings by gearing production and delivery schedules to a known demand at a definite future time. In addition, Fred Meyer sometimes paid transportation costs (R. 367-68). Selling expenses, likewise, were reduced because Fred Meyer's buyers often contacted suppliers' representatives at sales conventions (R. 193, 479), thereby reversing normal sales procedures. Additionally, very large orders were sometimes placed by means of telephone, further reducing the sellers' sales effort (R. 378).

4. There Is No Evidence That The Actual Cost Savings On Sales To Fred Meyer Were Disproportionate To The Alleged Price Differences Or That Fred Meyer Could Not Reasonably Have Believed Such Differences Were Cost Justified.

In an effort to demonstrate an alleged absence of cost savings, both the hearing examiner and the Commission found that Fred Meyer, the *buyer,* did nothing which resulted in cost savings in connection with its coupon promotion purchases (R. 43-46, 133-35), ignoring the fundamental principle that the relevant inquiry in a proceeding involving cost justification requires a consideration of the *seller's* costs. Thus, the assumption that Fred Meyer did nothing which resulted in cost savings, even if true, is irrelevant. The Commission did, however, admit that "neither complaint counsel nor respondents introduced evidence on [the] issue" of the actual costs incurred by suppliers in connection with such transactions (R. 131). Under *Automatic Canteen,* this burden was on the Commission.

In support of its finding of absence of cost justification the Commission relies upon the following testimony of an employee of the *buyer,* Fred Meyer:

> Q. Mr. Merrick, in 1956, when Fred Meyer Incorporated, was receiving this $1.55 price from Cannon Mills on Item 7205, did you to the best of your knowledge and recollection do anything different in your company that would result in a cost saving to Cannon?
>
> A. I can't answer what would save Cannon's costs. I'm not qualified to answer that.
>
> Q. Well, did you do anything to change your shipping transactions, anything that would save them freight?
>
> * * *
>
> The Witness: We pay the freight. We can't save Cannon Mills anything.
>
> By Mr. Snyder:
>
> Q. Exactly. Now, did you do anything that would result in a cost saving to Cannon Mills Company

so far as your dealings with the manufacturer's representative were concerned?

A. Well, I couldn't answer that.

Q. Was anything changed before or after the 1956 coupon book promotion, Mr. Merrick?

* * *

Q. To the best of your knowledge and recollection, can you recall anything that would save Cannon Mills money when they dealt with you?

* * *

THE WITNESS: I'm not qualified to say whether Cannon Mills saved money.

By Mr. Snyder:

Q. Did the Cannon Mills representative call on you approximately the same number of times?

A. I can't answer that (R. 367-68).

This simply establishes that Fred Meyer did not know and had no way of ascertaining its suppliers' costs. It was, therefore, incumbent upon the Commission to establish that Fred Meyer's suppliers incurred no cost savings and that Fred Meyer knew or should have known this fact. This it failed to do.

Apparently recognizing the absence of necessary evidence, the Commission attempts to defend the failure to demonstrate the absence of cost savings on the part of Fred Meyer's suppliers by asserting that the cost justification defense is "a one-way street," *i.e.,* while a cost study which demonstrated the existence of sufficient cost savings to account for the price difference would defeat the Commission's case, a study which failed to reveal cost savings would not serve to sustain the Commission's case in the absence of further evidence that respondents knew such to be the fact (R. 130-31). While this statement is accurate, the argument constitutes an abnegation of the Commission's responsibilities as a fact-finding body. Because it apparently believed that only the petitioners could benefit from a factual inquiry into the costs of Fred Meyer's suppliers, the Commission simply ignored the facts, disregarded *Automatic Canteen,* and purported to focus on "respondents' 'state of mind'" (R. 131).

Thus, the Commission speculated:

> Since respondents are unable to get any price concessions from these suppliers during eleven months out of the year, we think it a fair inference that respondents' purchasing in larger quantities than their competitors, to the extent that they do so, does not give rise to any measurable cost savings for those sellers. If such cost savings existed, why are respondents unable to induce their suppliers to pass them on to them during eleven months of each year? (R. 132).

The fallacy in this inference is obvious. There is no evidence which indicates that Fred Meyer's purchases during eleven months of the year involved quantities which remotely approached the very large quantities which were purchased for the limited four-week coupon book promotion.

For example, although the record shows that Fred Meyer purchased 2,200 cases of peaches (52,800 units) from Tri-Valley for the 1957 coupon promotion (CX 44-47), there is no evidence showing the actual amount of Fred Meyer's purchases from Tri-Valley at other times during the year. There is evidence, however, that Fred Meyer's "present average four weeks sales" during 1957 of the featured peaches amounted to only 27,046 units (CX 28), approximately one-half the amount purchased for the promotion.

Likewise, Fred Meyer purchased, in a single order, 3,967 cases (95,208 units) of canned corn from Idaho Canning for the 1957 coupon promotion (CX 57). Compared to this, while there is no evidence showing the actual amount of Fred Meyer's purchases at other times during 1957, the "present average sale for four weeks" during 1957 of Idaho Canning corn amounted to only 8,760 units (CX 293) or less than one-tenth the amount of the single purchase for the promotion.

The "present average sale for four weeks" by Fred Meyer of Burlington hosiery during 1957 was 800 to 1,200 dozen pairs (CX 156). There again is no evidence as to Fred Meyer's actual purchases at times other than during the promotion. However, compared to the normal 800 to 1,200 dozen pair average sale for four weeks, Fred Meyer purchased 1,743 dozen pairs for the 1957 coupon promotion (CX 141A-48B), and 4,308 dozen pairs for the 1958 promotion (CX 157A-69B).

Regarding Cannon Mills, Fred Meyer purchased 7,500 dozen towels for the 1957 coupon promotion, 5,500 of which were purchased under one order in March for delivery later in the year, and 2,000 dozen of which were purchased in October, both orders being placed by telephone (CX 119-22, 126-29, 378). The record is totally barren of evidence as to Fred Meyer's purchases from Cannon Mills at other times during the year.

It is obvious, therefore, that Fred Meyer's purchases of the featured items were substantially greater than its regular purchases during the other eleven months of the year. It was error, therefore, for the Commission to infer otherwise.[47]

Further and eloquent proof of the Commission's total disregard of the *Automatic Canteen* rule and the lack of reasonableness in the inferences it has drawn is provided by its findings with respect to the allegedly unlawful concessions granted by Cannon Mills.

In the present case, the Commission has concluded, on the basis of a series of unwarranted inferences, that Cannon Mills' prices to Fred Meyer were, in fact, *not* cost justified. However, in a Commission proceeding against Cannon Mills itself, *in which the challenged transaction*

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[47] Moreover, the record contains no evidence concerning prices actually paid by Fred Meyer to these suppliers during the other eleven months of the year and it is entirely possible that there were in fact cost savings which would have entitled Fred Meyer to lower prices during those months. Suppliers may choose not to reduce prices, even though legally entitled to do so. An inference to this effect is as well founded as the Commission's inference to the contrary.

was precisely the same as that challenged here, Cannon Mills successfully established that the discount to Fred Meyer was fully cost justified.[48] Indeed, the cost saving arising from Fred Meyer's unusually large orders amounted to 12.135 cents per dozen while the discount was only 10 cents per dozen.[49]

The unchallenged conclusion of the examiner in *Cannon Mills* is in direct conflict with the conclusion of the Commission in the present case and emphasizes the necessity that the Commission adduce exact proof on cost justification as required by *Automatic Canteen.* The two contradictory findings also emphasize the fact that a buyer cannot be expected to know the extent to which its suppliers have realized cost savings. The examiner's finding in *Cannon Mills* was based upon a detailed consideration of voluminous cost justification evidence adduced by Cannon Mills. A cost study was conducted under the supervision of a certified public accountant (who devoted 75 per cent of his time over a five month period to the preparation of the study), assisted by scores of accountants, clerks and technicians, and two independent experts.

Petitioners submit that, just as the Commission's categorical finding, based upon inference, that Cannon Mills' prices were unjustified was clearly incorrect, so must it be concluded that the Commission's inferential findings with respect to the other three suppliers charged with violating section 2(a) were incorrect. At a minimum, they are not supported by substantial, reliable and probative evidence as required by the Administrative Procedure Act. *Uni-*

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[48] *Cannon Mills Co.*, Docket 7494, Initial Decision (December 3, 1963); dismissed by Commission, 3 CCH Trade Reg. Rep., ¶ 16,878 (1964). The hearing examiner's findings in the *Cannon Mills* case were issued subsequent to the Commission's decision in the present case. In affirming the hearing examiner's dismissal of the complaint against Cannon Mills, the Commission evaded the cost justification issue. Instead, it ruled that the evidence did not support even the threshold finding of injury to competition, as required by the Act, and, hence, no violation of section 2(a) occurred.

[49] Initial Decision, p. 42. While the examiner in *Cannon Mills* observed that Fred Meyer's purchase, "although an isolated occurrence, involved a very substantial quantity" (Initial Decision, p. 16), the Commission in this case declined to even consider the quantities purchased (R. 135-36).

versal Camera Corp. v. *NLRB,* 340 U.S. 474 (1951). Certainly, it was error to infer that these suppliers did not realize cost savings since the quantities purchased, nature of dealings, and other factors relating to the challenged transactions were analogous to those of Cannon Mills.

For example, the representative from Idaho Canning categorically testified that very substantial cost savings resulted in a sale of 500 to 2000 cases as compared to a sale of only 40 to 50 cases. This testimony was neither generalized nor speculative. He pointed out that 14 employees are required to set up and operate a production line. The setting up time in packing 50 cases of private label merchandise is the same as that for an order of 500 cases. In addition, he testified that, on orders of 500 cases or more, the cost per case is four to five cents, whereas, an order of 20 cases might result in a cost as high as fifty cents per case (R. 505-6).[50]

The conclusion is, therefore, inescapable that the Commission, as required by the Supreme Court in *Automatic Canteen,* has failed to come forward with reliable, probative and substantial evidence in support of its inferential finding that the alleged price differentials received by Fred Meyer were not cost justified and that Fred Meyer knew or should have known such to have been the fact. Count I of the complaint should be dismissed.

5. The Commission Erred in Finding Competitive Injury

The Commission found that the price differences received by Fred Meyer from its suppliers were sufficient to create a reasonable probability of competitive injury. However, to this question the Commission has devoted only brief treatment (R. 100-3) and has ignored entirely the fact that the allowances received were "once-a-year" occurrences. If there was any effect on competition because of the price differences, that effect must necessarily

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[50] Although this testimony was fully substantiated by Idaho Canning's records (R. 509), the Commission ignored the evidence, contending that it related only to *labeling* costs (R. 134). It is clear, however, that the witness was referring to the cost of production of a small order as compared to a large order and did not confine his testimony solely to labeling.

have been temporary and minimal, and insufficient to support a finding of violation of 2(a). Rather, "there must be something more than an essentially temporary minimal impact on competition and probative analysis must reveal a causal relation between the price discrimination and an actual or reasonably probable injury to competition in the context of the factual situation involved." *American Oil Co.* v. *Federal Trade Commission,* 325 F. 2d 101, 106 (7th Cir. 1963).

Indeed, the Commission has acknowledged that the nature of the concessions received by Fred Meyer for the coupon promotions were not such as to create a reasonable probability of substantial injury to competition within the meaning of section 2(a). In *Cannon Mills Co.,* 3 CCH Trade Reg. Rep., ¶ 16,878 (1964), the Commission dismissed a charge that the very concessions here in issue granted by Cannon Mills to Fred Meyer violated 2(a) because competitive injury or probability of competitive injury had not been shown.[51] Petitioners submit, therefore, that the Commission erred in perfunctorily purporting to find requisite competitive injury here and that Count I of the Complaint must be dismissed.

B. The Alleged Section 5 Violation

In a proceeding under section 5 of the Federal Trade Commission Act involving the alleged inducement and receipt from sellers of disproportionate promotional allowances by a buyer, the Commission must adhere to the principles established in *Automatic Canteen.* It must first prove that the allowances received actually were granted in violation of section 2(d) of the Clayton Act. Assuming

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[51] The Commission held:

> . . . While finding a *prima facie* violation by respondent of Section 2(a) of the Clayton Act, as amended, the examiner dismissed the complaint on the ground that respondent had succeeded in its cost-justification defense. Upon examination of the record, the Commission has concluded that the evidence of record is insufficient to prove the requisite adverse effects on competition. Since a *prima facie* violation was not proved, it is unnecessary to reach the merits of respondent's cost-justification defense.

that such violations are established (which petitioners deny has been done here), it is the Commission's further burden to prove that the buyer knew or had reason to know that the allowances received were granted in violation of section 2(d). In the absence of specific proof that the buyer actually knew the allowances received were unlawful, it must be established by circumstantial evidence that the buyer requested such allowances under such circumstances as to render lack of knowledge of illegality culpable. The Commission in the present case has failed entirely to adduce such evidence. Instead, it has relied upon tenuous inferences and has established totally novel tests of liability.

1. The Commission's Contention That A Buyer Who Initiates A Promotional Activity Is Automatically Placed On Notice That Its Supplier's Payments Are Discriminatory Is Incorrect

The Second Circuit has categorically held that section 2(d) ". . . does not ban all promotional allowances, nor even all allowances which are the 'result of private negotiations.'" *Atalanta Trading Corp.* v. *Federal Trade Commission,* 258 F.2d 365, 370 (2d Cir. 1958). Nor does section 2(d) prohibit a promotional plan ". . . tailored exclusively to fit the desires of the two parties negotiating . . ." *(Id.* at 372).

It is clear, therefore, that the mere fact that suppliers participated in Fred Meyer's coupon promotion under individually negotiated terms does not permit a *per se* finding that the suppliers violated the law or that violations were induced by Fred Meyer with knowledge of illegality. Rather, a finding of unlawful inducement can only be made ". . . in circumstances where it appears that such want of knowledge on the buyer's part was culpable. . . ." *Giant Food, Inc.* v. *Federal Trade Commission,* 307 F.2d 184, 187 (D. C. Cir. 1962; emphasis added).

In order to find that Fred Meyer acted culpably, it must be shown that good faith was lacking. Good faith, the Commission has stated in connection with the meeting of competition defense,

> . . . is a flexible and pragmatic, not technical or doctrinaire concept. The standard of good faith is

> simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. . . . Such a standard, whether it be considered "subjective" or "objective", is inherently *ad hoc.* Rigid rules and inflexible absolutes are especially inappropriate . . . the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern . . .[52]

In complete disregard of the established requirements of proof, the Commission, in an apparent effort to create a new *per se* test of liability, has announced a novel and unsound rule that any buyer who initiates a promotional activity is automatically placed on notice of the possible nonproportionality of its suppliers' payments and is, therefore, under a duty to make affirmative inquiry. Thus, stated the Commission:

> We think the law is plain that a buyer who initiates a promotional service and induces his supplier to pay him for performing it has possessed himself of information sufficient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to [its] competitors (R. 118).

Never before, absent evidence of culpability, has any court declared that a buyer was obligated to affirmatively inquire of its suppliers as to the legality of the payments offered or made. Indeed, in *Automatic Canteen* the Court stated:

> [T]he Commission may consider that a seller stating that a price would be unlawful might in some situations be puffing rather than stating anything which a buyer can rely on or should be charged with. On the other hand, the Commission may in some circumstances wish to refuse to accept a buyer's claim that he relied on an affidavit or other assurance from the seller that price differentials were cost-justified; *the furnishing of such an assurance might, together with other circumstances, indicate a sufficient absence*

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[52] *Continental Baking Co.*, Docket 7630, Opinion of the Commission (December 31, 1963), p. 2.

of arm's-length bargaining to raise serious doubts as to the weight the assurance should be given in support of a buyer's claim (346 U.S. at 81, n. 24; emphasis added).

Furthermore, the Commission's new rule contemplates that a buyer must assume that its suppliers are engaging in discriminatory practices and are acting unlawfully. Again, this is an irreconcilable conflict with *Automatic Canteen* where the Court stated that it cannot be assumed that price differentials are frequently "within the prohibited range of price discriminations" and that to make such an assumption would render the required proof of "knowledge" meaningless (346 U.S. at 71).

Moreover, such an assumption is directly contrary to the settled principle that there is a presumption that men obey the law. "There is a presumption that business is conducted lawfully . . . and that all things are rightfully done . . . and where the act of a party may be referred indifferently to one of two motives, the law prefers to refer it to that which is honest . . .". *Fidelity and Deposit Co.* v. *Grand National Bank of St. Louis,* 69 F. 2d 177, 183 (8th Cir. 1934).[53]

2. The Nature of the Coupon Promotion Did Not Render Payments of Suppliers Incapable of Proportionalization

The Commission held that Fred Meyer knew or should have known it was inducing and receiving unlawful payments because, in part, such payments were incapable of proportionalization to competing customers. This holding is based primarily on two erroneous grounds: (1) that Fred Meyer required the payments to be "exclusive" with it during the period of the promotion (R. 119); and (2) that the promotion itself was "unique" (R. 123).

[53] See also *United States* v. *Detroit Timber and Lumber Co.,* 200 U.S. 321 (1906), *St. Joseph Stockyard Co.* v. *United States,* 187 Fed. 104, 106 (8th Cir. 1911), *Athens Roller Mills, Inc.* v. *Commissioner of Internal Revenue,* 136 F. 2d 125, 128 (6th Cir. 1943).

As to the first ground, the Commission relied upon the following legend appearing in the promotion information form:

> Offer Must Be Exclusive at Fred Meyer During the 4 Week Period (R. 119).

The Commission argues that the meaning of this language is that "each supplier who participated in respondents' 'coupon book' promotion agreed with respondents that it would not, during that particular four-week period of time, 'participate' in a similar program sponsored by any other buyers" (R. 120). The record, however, contains no explanation of the meaning, purpose, or operation of the language. Construed as a requirement that participating suppliers could not enter into coupon book promotions of other retailers, as the Commission has done, there is no indication that it was enforced or that there was any occasion to enforce it. The Commission, for example, failed to adduce evidence that any supplier was excluded from the coupon book promotion because of its participation in a promotional activity sponsored by another retailer. Correspondingly, there is no evidence indicating that any other retailer desired to conduct a coupon promotion at the same time as did Fred Meyer and was prevented or hindered from doing so.

In support of the second ground of its holding, the Commission placed weight upon statements found in promotional literature which described the coupon book program as a "unique" advertising medium (R. 123). This is meaningless—every promotion is "unique" to a salesman. In any event, no more can be inferred than that the *theme* of the promotion was unusual. Certainly there was nothing "unique" about the promotion in terms of services and facilities rendered. In consideration for their payments, suppliers received promotional services and facilities commonly utilized by retailers, *viz.,* radio and newspaper advertising, window and in-store displays, signs, banners, sales bulletins, sales meetings and prizes (CX 6, 18, 19). It is obvious, therefore, that suppliers could have formulated proportional programs for all competing customers, and that such customers would have been able to perform the same services and furnish the same facilities performed and furnished by Fred Meyer if they so desired.

Moreover, it is not necessary that all facets of a particular program be adaptable to the business of all customers. The Commission has consistently ruled that ". . . a comprehensive plan [need not] be so tailored that every feature of it will be usable or suitable for every customer. In many cases that would be an impossibility." *Lever Brothers Co.,* 50 F.T.C. 494, 510 (1953). Indeed, not only does the law permit a seller to pay for services of different types, it sometimes requires him to do so. Thus, in *Exquisite Form Brassiere, Inc.,* 57 F.T.C. 1036 (1960), remanded on other grounds, *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission,* 301 F. 2d 499 (D. C. Cir. 1961), *cert. denied* 369 U.S. 888 (1962), the Commission declared:

> The customer and not the seller should decide what is or is not usable or suitable for him and should have the opportunity to select that feature of a plan which suits him best (57 F.T.C. at 1050).[54]

Thus, it is well recognized that the ability to provide useful and effective services and facilities may vary greatly among different customers. It is this principle which precludes, as a matter of law, any finding that the fact petitioners received payments for particular services has any probative value in establishing knowledge of illegality.

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[54] While the various types of services and facilities for which a seller may pay promotional allowances have never been completely enumerated by statue or by decisions, examples of some heretofore recognized and approved by the courts and the Commission are set forth in the Commission's "Guides for Advertising Allowances and Other Merchandising Payments and Services" (Adopted May 19, 1960), 1 CCH Trade Reg. Rep., ¶ 3980:

> The following have been held to be services or facilities covered by the law where the seller has paid the buyer for furnishing them: Any kind of advertising, Handbills, Window and floor displays, Special sales or promotional efforts for which "push money" is paid to clerks, salesmen, and other employees of the customers, Demonstrators and demonstrations, Collection of orders from individual stores, Furnishing complete distribution of seller's line.

3. Fred Meyer Neither Knew Nor Had Reason to Know the Specific Prices and Allowances Offered and Granted to the Allegedly Disfavored Customers or even that its Suppliers Sold Products of Like Grade and Quality to Such Customers.

The Commission claimed that Fred Meyer maintained and operated a "vigorous intelligence network" through which it learned that its suppliers sold products of like grade and quality to the allegedly disfavored customers and was informed of the specific prices and allowances granted to such customers (R. 111). This so-called "vigorous intelligence network" consisted merely of such normal and routine activities as checking newspaper advertisements, comparative shopping, checking and testing certain items and reporting by buyers of retail prices of competitors (R. 105-07). The Commission also found that Fred Meyer reviewed price bulletins distributed by unidentified suppliers and brokers and that it maintained a "pretty close" personal contact with the Portland broker of Tri-Valley and Idaho Canning (R. 107-10).

None of these activities, however, informed Fred Meyer of the *actual* prices paid or allowances received by the allegedly disfavored customers or even that they *actually* purchased products of like grade and quality. Indeed, in an incomprehensible statement in view of its affirmative finding, the Commission so concedes: "Respondents' vigorous intelligence network eloquently attests to their quite natural desire to know these things; if they did not succeed in learning them, it was because they lacked the *power,* not the inclination" (R. 111; emphasis in original). This is a patent example of the Commission's refusal to limit its findings to the evidence. Naturally, petitioners possessed the "inclination" to know the prices paid and allowances received by their competitors. But this inclination does not fill the evidentiary vacuum.

Thus, assuming *arguendo* that the suppliers did, in fact, sell products of like grade and quality to the alleged disfavored customers, it is clear that Fred Meyer neither knew nor had reason to know such fact. With the exception of Cannon Mills, all of the suppliers charged to have violated section 2(d) in granting Fred Meyer payments in connection with the coupon promotions sold *private label* merchandise to Fred Meyer under different labels than used for the merchandise sold to the allegedly disfavored customers (R. 425-26, 452-54; CX 42A-43B, 46-48, 50, 52, 63). Fred Meyer's buyer who purchased from Tri-Valley and Idaho Canning testified:

> To my knowledge, I have never asked a representative of Tri-Valley Packing Association what they are charging other people in this area, or even to whom they sell in this area (R. 218).
>
> * * *
>
> Q. Do you know what other buyers in the Portland area are buying Tri-Valley peaches, for example?
> A. No, sir.
> Q. Do you know what other buyers, if any, in the Portland area are buying Idaho Canning products?
> A. No, sir.
> Q. Did you in 1957?
> A. No, sir.
> Q. Did you in 1958?
> A. No, sir (R. 213-14).[55]

Naturally, if Fred Meyer did not know that the allegedly disfavored customers even purchased from the suppliers in question it could not have known that it competed with such customers in the resale of products of like grade and quality.

In *Tri-Valley,* this Court stated that its view as to the existence of competition in the resale of products of like grade and quality between two customers operating at the same functional level was in keeping with the underlying purpose of section 2(d). The Court explained that

[55] Uncontradicted and unimpeached testimony as to matters of common observation or within expert knowledge, if not inherently incredible, must be accepted as establishing the facts. *Nishikawa* v. *Dulles,* 356 U.S. 129, 131, 136-37 (1958); *Dickinson* v. *United States,* 346 U.S. 389, 396-97 (1953); *Chesapeake & Ohio R. R. Co.* v. *Martin,* 283 U.S. 209, 214 (1931); *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 299 (1930).

the objective of assuring fair dealing by a seller with his customers could not be achieved unless the seller assumed that all direct customers in functional competition in the same geographic area buying products of like grade and quality within approximately the same period of time were in actual competition with one another in the distribution of such products (329 F. 2d at 709). This rationale, however, is not sufficient to justify a finding of violation against a *buyer.* An assumption which a seller may be required to make in determining the necessity of according proportional treatment among his customers is not necessarily an assumption which a buyer is capable of making in determining whether an allowance offered by a seller has been extended by that seller on proportionally equal terms to all customers. More definite proof must be required because the buyer does not even know the identity of the seller's other customers, much less the specific products which they buy.

For this reason, it was incumbent upon the Commission to trace the sale of goods of like grade and quality to the shelves of competing outlets in order to establish the existence of competition and to prove that Fred Meyer had knowledge of the circumstances. The Commission has done neither.

Furthermore, even if Fred Meyer had known the identity of other customers of the private label suppliers, this would not provide a basis for an inference that it knew that the products sold to such customers were of like grade and quality to those featured during the promotions. It cannot be inferred that different private label products are of like grade and quality without specific proof. To a large degree, however, such proof is absent (see *supra,* pp. 45-48, 53-54, 55-58).[56] It certainly cannot be inferred, therefore, that Fred Meyer had knowledge that

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[56] The failure to produce material evidence which is available and which would be expected to be produced under the circumstances gives rise to a presumption that such evidence would be unfavorable or adverse to the party who withholds it. *Mammoth Oil Company* v. *United States,* 275 U.S. 13 (1927); *Kirby* v. *Tallmadge,* 160 U.S. 379 (1896).

goods of like grade and quality were sold to the allegedly disfavored customers.

Indeed, in view of the fact that every retailer who testified on the subject admitted that he had no knowledge of the grade and quality of private brand products sold by other retailers, the inference must be to the contrary. Thus, for example, Mr. Meier, Divisional Merchandise Manager of Lipman, Wolfe, testified:

> As a rule, I'm not too familiar with the competition in the community with regard to this product [Burlington hosiery sold under Lipman's "Waverly" brand] because we have it [the "Waverly" brand] exclusively, and I tend to my own business, rather than looking at what the other guy is doing (R. 447).

Likewise, there is no evidence which can support a finding that Fred Meyer knew or should have known the specific prices and allowances granted to allegedly disfavored customers and the Commission did not presume to find that Fred Meyer had *actual* knowledge. Rather, it merely refers to the fact that Fred Meyer maintained a "pretty close" personal contact with the broker representing Tri-Valley and Idaho Canning to support its inference that Fred Meyer knew or should have known the specific prices and allowances to allegedly disfavored customers. However, there is nothing which even suggests that this broker advised Fred Meyer concerning the specific prices or allowances to his other customers. Certainly, knowledge in the possession of a seller's broker cannot be attributed, by inference, to the buyer. It can be inferred, however, that neither brokers nor sellers travel about dispensing comparative price or allowance information to competing customers. Thus, the mere fact that Fred Meyer dealt with a broker cannot substitute for evidence which is lacking.

Moreover, the fact that Fred Meyer did not know the prices and allowances of other customers is corroborated by testimony of other retailers that they did not possess such information.[57]

It must be concluded, therefore, that the Commission erred in finding that Fred Meyer maintained an "intelligence network" which served to inform it of prices and allowances offered and granted to the allegedly disfavored customers or which informed it of the fact, if indeed it was a fact, that those customers purchased, handled, or sold products of like grade and quality. For these reasons, both Counts I and II of the Complaint must be dismissed.

4. Fred Meyer Neither Knew Nor Had Reason to Know That the Allowances Granted By Philip Morris Were Not Available to Other Customers

In an effort to prove that Philip Morris Company failed to proportionalize its promotional allowances among all competing customers, the Commission relied upon the following testimony of Philip Morris' local sales representative:

> Q. Whereas if a competing customer of Fred Meyer wanted that type of an allowance, he would have to come to you and ask for it?
> A. *It's available to them.*
> Q. But do you make the offer, Mr. Eberling?
> A. No (R. 536; emphasis added).

This testimony means nothing more than that the local sales representative did not personally offer the allowances in question. He testified it was his practice to forward requests for promotional assistance to Philip Morris' New York office and that all the allowances in issue were avail-

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[57] The Divisional Merchandise Manager of Lipman, Wolfe testified, for example, that he had no knowledge of the advertising and promotional allowances offered by Cannon Mills in 1956, 1957 and 1958 (R. 393). This corroborates fully the testimony of representatives of Fred Meyer that they, likewise, did not have knowledge of the allowances offered by suppliers to other customers (R. 363, 380-81, 691-92).

able to all customers either upon request or pursuant to an offering (R. 535-38). The Commission, however, failed to produce any witnesses or records from the New York office showing what offers of promotional assistance had been made by Philip Morris from that office.

Moreover, the Commission clearly erred in ruling that Fred Meyer knew or had reason to know that offers of promotional allowances, which were admittedly "available", had not been "affirmatively offered" to all competing customers by Philip Morris.

It would be highly unfair to make a buyer chargeable with knowledge that a seller has failed to undertake the additional step of extending an "affirmative offer" where, as here, the Commission can claim no more than that Philip Morris made its allowances "available" to all competing customers on proportionally equal terms but did not extend an "affirmative offer" in some instances to certain customers. Certainly, Fred Meyer cannot be held chargeable with knowledge under such circumstances.

Moreover, as pointed out *supra*, pp. 60-66, the alleged disfavored customers of Philip Morris in fact received very substantial promotional payments. However, the fragmentary evidence makes it impossible to determine whether the dollar amounts received by other customers were in fact proportional to the amounts received by Fred Meyer because there is no evidence as to comparative sales volumes from which such calculations can be made and because the relevant records relating to promotional payments by Philip Morris, kept in their New York office, were not produced.

Therefore, the allegations under Count II of the Complaint as they relate to Philip Morris must be dismissed.

VI. THE COMMISSION IS NOT AUTHORIZED TO PROCEED AGAINST A BUYER FOR THE ALLEGED INDUCEMENT AND RECEIPT OF DISCRIMINATORY PROMOTIONAL BENEFITS UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

The Commission erred in ruling that section 5 of the Federal Trade Commission Act, which contains a general prohibition against "unfair methods of competition", authorizes it to proceed against a buyer for the alleged inducement of a promotional payment which the seller fails to proportionalize in accordance with section 2(d) of the Clayton Act. While the Commission's authority to so proceed has thus far been sustained, over vigorous dissent, by the Second and District of Columbia Circuits, *The Grand Union Co.* v. *Federal Trade Commission,* 300 F.2d 92 (2d Cir. 1962); *American News Co.* v. *Federal Trade Commission,* 300 F.2d 104 (2d Cir. 1962); *Giant Food, Inc.* v. *Federal Trade Commission,* 307 F.2d 184 (D.C. Cir. 1962), the issue has not yet been finally determined. It is petitioners' contention that the persuasive arguments set forth in the dissenting opinions of Judge Moore and Commissioner Tait in *American News* and *Grand Union, supra,*[58] compel the conclusion that the Commission is not authorized to utilize section 5 against buyers.

In essence petitioners' contention, in the words of Judge Moore, is that the Commission, in assuming authority to proceed against a buyer under section 5 of the Federal Trade Commission Act has

> . . . arrogate[d] to itself the legislative powers of Congress whenever there appears a field which Congress has not covered but which the Commission believes should be covered by legislation of its own making. *Grand Union Co., supra,* at 101 (dissenting opinion).

Thus, while the Clayton Act contains *express* prohibitions against the unlawful inducement and receipt by a buyer of unjustified price discriminations and sham broker-

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[58] See 300 F. 2d at 101; 300 F. 2d at 112; and 57 F.T.C. at 426.

age payments, nowhere in the Act (or in any other Act) has Congress prohibited inducement of disproportionate promotional allowances. In short, under the Clayton Act Congress has given promotional payments a completely different status than payments which take the form of discriminations in price and brokerage.[59]

The Commission, while acknowledging that there is no express prohibition in the Clayton Act against inducement and receipt of discriminatory promotional payments, has held "that Congress intended to include the knowing inducement or receipt of a disproportionate allowance within the purview of section 2(f) and that its failure to do so was the result of an oversight."[60] *The Grand Union Co.,* 57 F.T.C. 382, 422 (1960). Therefore, the Commission arrogates to itself the authority to correct Congressional "oversight" under the guise of an expansive interpretation of section 5. However, the Supreme Court has declared that neither the Commission nor the courts should attempt to "supply what Congress has studiously omitted" from the Robinson-Patman amendments to the Clayton Act. *Federal Trade Commission* v. *Simplicity Pattern Co.,* 360 U.S. 55, 67 (1959).

This is especially true, the Supreme Court has clearly noted, in a case such as the instant one where the extension of jurisdiction sought by the Commission engenders conflict with the Sherman Act. Thus, in *Automatic Canteen,* the Court recognized that bargaining between buyers

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[59] Section 2(a) of the Act prohibits discriminations in price where the effect may be substantially to lessen competition and section 2(f) makes it unlawful for a person to induce or receive discriminations in price prohibited by section 2(a). Section 2(c) expressly makes it unlawful for any person to grant or receive discriminations in the form of sham brokerage payments and section 2(d) expressly prohibits the granting by a supplier of disproportionate promotional allowances. However, contrary to sections 2(a) and 2(c), there is no provision making unlawful the inducement and receipt of allowances prohibited under 2(d).

[60] As Judge Moore pointed out in *Grand Union, supra*: "The failure to include the buyer clearly could not have been inadvertent because the very purpose of the legislation was to curb the power of the mass buyer" (300 F.2d at 102; dissenting opinion).

and sellers is the essence of competition and strictly construed section 2(f), stating that the statute should not be interpreted as ". . . putting the buyer at his peril whenever he engages in price bargaining" because "[s]uch a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated" (346 U.S. at 73-74). This the Court did because of its ". . . duty to reconcile such interpretation . . . with the broader antitrust policies that have been laid down by Congress," referring to the Sherman Act (346 U.S. at 74). Based on this premise, the Court went out of its way in *Automatic Canteen* to reject any easy standards for conviction under section 2(f) and read into the statute all of the seller's defenses under section 2(a). Such defenses, of course, are not available under 2(d), a *per se* section, and certainly, an attempted extension of the Commission's jurisdiction to hold buyers accountable for inducing violations of section 2(d) is fraught with greater inherent dangers than easy enforcement standards under section 2(f), which were rejected by the Court. Curtailment of "sturdy bargaining" between buyer and seller will surely result if the Commission is allowed to extend its jurisdiction, as it here asserts. This result, as pointed out by the Supreme Court, is not in harmony with "broader antitrust policies".

Furthermore, the Commission in its assumption of jurisdiction under section 5 of the Federal Trade Commission Act, ignores the fact that section 5 of that Act is intended to reach practices which have an actual or probable adverse effect upon competition. Section 2(d), however, is a *per se* section; *i.e.,* no finding of actual or potential injury to competition is required to sustain a finding of violation. The use of section 5 to prohibit the inducement of disproportionate promotional allowances thus runs contrary to existing precedents under section 5 which require (except in cases such as false advertising, price fixing, conspiracy to boycott, etc., where a *per se* rule applies) a showing of actual or probable injury to competition. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.,* 344 U.S. 392, 394-95 (1953); *Fashion Originators Guild* v. *Federal Trade Commission,* 312 U.S. 457, 465 (1941); *Federal Trade Commission* v. *Keppel & Bros.,* 291 U.S. 304 (1934); *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948); *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U.S. 441 (1922).[61]

On repeated occasions the Supreme Court has reaffirmed these early decisions holding that an unfair method of competition is one which ''destroys competition and estab-establishes monopoly.''[62] Thus, if the Commission is to apply section 5 to a new business practice, it must make inquiry into, and a determination of, the ''character'' and ''consequences'' of the challenged practice, showing that it is ''against public policy because of 'its dangerous tendency unduly to hinder competition or to create monopoly'.'' *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 454 (1922).[63]

For the foregoing reasons, it must be concluded that the Commission is not authorized to proceed against a buyer under section 5 of the Federal Trade Commission Act and that Count II of the Complaint must be dismissed.

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[61] The scope of section 5's prohibition against ''unfair methods of competition'' was first enunciated by the Supreme Court in 1920 in *Federal Trade Commission* v. *Gratz,* 253 U.S. 421, 427-28 (1920):

> The words ''unfair method(s) of competition'' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy *because of their dangerous tendency unduly to hinder competition or create monopoly.* The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade (emphasis added).

[62] *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 307 (1963).

[63] Applying the test of injury to competition established in *Gratz, Keppel, Motion Picture Advertising* and *Beech-Nut,* the Supreme Court has set aside Commission decisions and orders where there has been a failure to show the requisite adverse competitive effects. *Federal Trade Commission* v. *Curtis Publishing Co.,* 260 U.S. 568 (1923); *Federal Trade Commission* v. *Sinclair Refining Co.,* 261 U.S. 463 (1923).

VII. THE COMMISSION ERRED IN ISSUING AN ORDER TO CEASE AND DESIST AGAINST THE INDIVIDUAL PETITIONERS

The Commission's order to cease and desist, while designed to reach only certain *corporate* activities of the *corporate* petitioner, also applies by its terms to Mr. Fred G. Meyer and Mr. Earle A. Chiles, "individually and as officers of corporate respondent" (R. 57). Absent a showing of special circumstances indicating a likelihood that corporate petitioner may seek to evade the order issued, it was error for the Commission to include these individuals, as individuals, in the order. There has been no showing.

Corporate petitioner is a long-established and highly responsible company. It was organized in 1923 (R. 162), and owns and operates thirteen retail stores with sales in excess of $40 million annually (R. 13).

Mr. Fred G. Meyer holds no position other than Chairman of the Board, is a minority stockholder, (having only 38.35 percent of the 1,479,250 shares of common stock issued and outstanding (CX 363, pp. 3, 11)), and has nothing to do with the advertising and sales policies of the corporate petitioner (R. 464). Indeed, Mr. Meyer ceased activities in the Advertising and Sales Division approximately ten years ago, and is not even familiar with the operation of the coupon book program (R. 467).

Earle A. Chiles, President of Fred Meyer since 1955, is generally responsible for merchandising operations, but only at the policy-making level (R. 161-62. He owns only 14.37 percent of the company's outstanding common stock (CX 363, pp. 3, 11).

Ownership of a minority stock interest is no basis for including individually a corporate officer in an order. *Ostermoor & Co.* v. *Federal Trade Commission,* 16 F.2d 962 (2d Cir. 1927). Nor is an order against an individual warranted simply because he happens to be Chairman of the Board or a corporate officer. *Maryland Baking Co.,* 52 F.T.C. 1679, 1691 (1956).

Disregarding these precedents, the Commission merely relies upon certain language in *Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112, 120 (1937), a false advertising case (R. 136-37). This reliance is misplaced. There is nothing in the present case which suggests that the individuals "acted with practically the same freedom as though no corporation had existed" or were "the actors" with respect to the alleged unlawful practice.

VIII. THE COMMISSION ERRED IN ISSUING AN ORDER TO CEASE AND DESIST IN TERMS WHICH BEAR NO REASONABLE RELATIONSHIP TO THE ALLEGEDLY UNLAWFUL PRACTICE

The Commission's all-encompassing order to cease and desist bears no reasonable relationship to the allegedly unlawful practices. The allegations of the complaint are limited, with only one minor exception, to Fred Meyer's coupon book program. But this program is not even mentioned in the order.

If any order is justified in this case, which petitioners deny, it must be directed solely against the allegedly illegal aspects of the coupon book program and must clearly advise petitioners of the practices they must discontinue. Only such an order can provide a basis for the Commission and the courts to readily determine questions of compliance or non-compliance.

A. The Section 2(f) Order

The 1959 Clayton Act Finality Act [64] made all Robinson-Patman Act orders final and enforceable in the same manner as Commission orders under the Federal Trade Commission Act,[65] *i.e.,* they become final and enforceable 60 days after their issuance in the absence of an appeal and a $5,000 fine is provided for each violation of a final order, or, in the event of a continuing violation, the penalty may be $5,000 per day of violation.

The new enforcement provisions of the Finality Act constitute a legislative modification of the rationale of the

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64 15 U.S.C. § 21.

65 15 U.S.C. § 45.

Ruberoid case,[66] in which the Supreme Court sanctioned the issuance of Robinson-Patman Act orders broadly drawn in terms of the generalities of the statute but in which the Court declined to order their enforcement. Now that such orders become final automatically, it is clearly necessary that they be framed in specific terms in the first instance. The intention of Congress to shift from the courts back to the Commission the task of formulating orders which are reasonably definitive is clearly evidenced by the legislative history of the Finality Act.[67]

In ruling upon the effect of the 1959 amendments upon the Commission's order-writing function, the Supreme Court held in *Federal Trade Commission* v. *Henry Broch & Co.,* 368 U.S. 360, 367-68 (1962):

> The severity of possible penalities prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.[68]

The first decision in a Robinson-Patman case construing the Finality Act was *Swanee Paper Corp.* v. *Federal Trade Commission,* 291 F.2d 833 (2d Cir. 1961), which arose under section 2(d). There, the court ruled that ". . . there must be some relation between the facts found and the

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[66] *Ruberoid Co.* v. *Federal Trade Commission,* 343 U.S. 470 (1952).

[67] H. Rep. No. 580, "Finality of Clayton Act Orders, to Accompany S. 726", 86th Cong., 1st Sess. (1959), p. 6; S. Rep. No. 83, "Making Clayton Act Orders Final, To Accompany S. 726", 86th Cong. 1st Sess. (1959), p. 3; Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U. S. Senate, 85th Cong., 2d Sess., pursuant to S. Res. 231 (1958), p. 31; Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 374; Hearings before the Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, House of Representatives, 86th Cong., 1st Sess., on H.R. 432, H.R. 2977, H.R. 6049, and S. 726, Serial No. 3 (1959), p. 86; 105 Cong. Rec. 12735 (1959).

[68] While the *Henry Broch* case was a proceeding under subsection 2(c) of the statute, the Court's rationale is equally applicable to proceeding under other subsections.

breadth of the order" (*Id.* at 837), and ". . . the order should be limited to the particular practice found to violate the statute" (*Id.* at 838).

The Commission's policy since enactment of the 1959 amendments, as to the scope of Robinson-Patman Act orders, has often been wavering and inconsistent. In several cases, the Commission has attempted to relate the scope of the order, with some degree of reasonable precision, to the practice alleged to be unlawful. For example, in *The Quaker Oats Co.,* CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 15,858, at p. 20,649 (1962), the Commission properly restricted the scope of its 2(d) order to "cat food and related products" because the only product shown to have been involved in the promotional event held to be unlawful was cat food. For similar reasons, the Commission restricted its 2(d) order in *Vanity Fair Paper Mills, Inc.,* CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 15,796 (1962), to "paper products." Likewise, in *Transogram Co.,* CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 16,080 (1962), the Commission's 2(d) order was restricted to the products shown to have been involved in the violation, namely "Toy, game, or hobby products."

Of possibly greater significance was the Commission's attempt in *Transogram* to define the specific services to which the order should apply. Thus, the order reached only the following specific services and facilities:

> . . . advertising or other publicity, furnished by or through a customer, in a toy catalogue, hand bill, circular, or any other printed publication serving the purpose of a buying guide, distributed . . . by such customer . . . (Final Order of the Commission, Sept. 19, 1962).

The Commission's more recent order in *All-Luminum Products, Inc.,* 3 CCH Trade Reg. Rep., ¶ 16,665 (1963), appears to conform even more closely with the Congressional objectives underlying the Clayton Act Finality Act. In addition to restricting the order to certain defined services and facilities, namely, catalogues or other buying guides and trade shows, the order was restricted to payments made to the following classes of customers:

(1) any wholesale customer of respondents whether or not such customer maintains an inventory of respondents' products, or

(2) any mail-order distribution or catalogue house that is a customer of respondents.

The foregoing orders were issued against sellers under section 2(d) of the statute. It is obvious that the requirement of specificity in an order against a buyer should be even greater. This necessarily follows from the Commission's own ruling that section 2(d) ". . . is in itself a very narrow definition of an illegal trade practice" and ". . . covers a limited area in which forms of violations are like or related . . ." *Vanity Fair Paper Mills, Inc.,* CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 15,796, at p. 20,610 (1962).

The broader scope of section 2(a) dictates, as the Commission indicated in *Vanity Fair, supra*, that orders issued thereunder must be strictly related to the specific practice alleged to be in violation of law and must not be framed in terms broadly encompassing the entire range of possible statutory violations. This is all the more true with respect to orders under section 2(f) where, in order to avoid a charge of violation, a buyer must assure that the prices charged by each of his suppliers are not illegally discriminatory.

The Commission's 2(f) order is also defective in that it prohibits the knowing inducement or knowing receipt of discrimination in price by "directly or indirectly" inducng or receiving a net price that is known, or should be known, to be below the net price at which products "of like grade and quality" are being sold to other purchasers where:

(a) the seller is competing with any other seller for petitioners' business;

(b) the petitioners are competing with other purchasers of the seller;

(c) the petitioners are competing with customers of other purchasers of the seller.

The nature of competition between Fred Meyer and other retail outlets is difficult to ascertain. The fact that petitioners might know that a competing retail outlet deals in a manufacturer's products of like grade and quality to those sold by them would provide no indication that the competing retailer actually purchased from the manufacturer. It may well have purchased the goods from a third party.

For these reasons, any order entered in this case must make it clear that no penalty for violation can attach unless the petitioners have actual knowledge of the competitive relationships affected by a price discrimination at either the primary or the secondary levels.

B. The Section 5 Order

Subsequent to the initial decision herein, the Second Circuit has twice held that orders under section 5 prohibiting the inducement or receipt of allegedly illegal promotional allowances must be framed in terms of ". . . the particular practice found to violate the statute." *Grand Union Co.* v. *Federal Trade Commission,* 300 F.2d 92, 100 (2d Cir. 1962); *American News Co.* v. *Federal Trade Commission,* 300 F.2d 104, 111 (2d Cir. 1962).

In *Grand Union,* the court ruled that the Commission's discretion ". . . does not permit an injunction of all violations of the statute just because a single violation has been found." Ruling that the order must be limited to the particular practice found to violate the statute, the court held that, since Grand Union had received as well as solicited payments, the order must be limited to ". . . a prohibition of either knowing receipt or knowing inducement and receipt" (300 F.2d at 100-101). A similar ruling was made in *American News, supra.*

In the present case, instead of being related to the knowing receipt of disproportionate promotional payments, the order extends to the ". . . [i]nducing, receiving or contracting for the receipt of anything of value . . .''. Likewise, although the services and facilities furnished by petitioners were limited to a single annual coupon book program, the order extends to unrelated ''. . . advertising or any other services or facilities . . .''. Furthermore, the practice in the present case is narrowly confined to a promotional program involving the ''offering for sale'' of only specific products manufactured by particular suppliers, but the order extends to ''processing'' and ''handling'', as well as the ''offering for sale'' of products. In addition, the order extends to *all* products involved in respondents' promotional activities, *i.e.,* thousands of products, and is not limited to the specific products involved in the Commission's findings of alleged violation as was the order in the *Quaker Oats* case, *supra,* p. 98.

From the foregoing, it is obvious that the order, if any order is appropriate, must be modified so as to conform to the particular practice involved in this case.

The section 5 order must further be modified insofar as it applies to the inducement of promotional allowances which Fred Meyer knows or should know are not offered or otherwise made available to its competitors ''including other customers who resell to purchasers who compete'' with Fred Meyer at the retail level (R. 58). This language amounts to a categorical declaration that wholesale customers of a supplier are entitled to promotional benefits equal to those granted retail customers. However, as this Court has held, section 2(d) does not envision this result *unless* there exists an indirect customer relationship between the supplier and the customers of the wholesaler (see *supra,* pp. 30-31).

In *Grand Union Co.* v. *Federal Trade Commission,* 300 F.2d 92, 100 (2d Cir. 1962), the court pointed out:

> Unlike the seller, the buyer has no control over those payments—he cannot insure that they are ''proportionalized''. . . . It would be a harsh burden to hold that any buyer who induces or receives a payment later found to be disproportionate has engaged thereby in unfair competition.

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> Unlike the seller, the buyer has no control over those payments—he cannot insure that they are ''proportionalized''. . . . It would be a harsh burden to hold that any buyer who induces or receives a payment later found to be disproportionate has engaged thereby in unfair competition.

These difficulties are compounded when the order's scope is broadened, as here, to require that payments for services and facilities offered to competing retail customers be extended to wholesaler customers of the supplier. A retailer, such as Fred Meyer, does not know, and has no way of ascertaining, the retailers to whom such wholesalers sell, nor what retailer customers of particular wholesalers compete with it. Petitioners do not know, and have no way of determining, the grade and quality of the products sold by such wholesalers or their commercial origin. They do not know, and have no way of determining, the allowances offered such wholesalers by manufacturers. In addition, petitioners are completely unequipped to determine whether particular allowances offered by suppliers to wholesalers are accorded on proportionally equal terms, and whether they are suitable, as a practical matter, to the needs of such wholesalers. For these reasons, the Commission's extension of the order to require proportionalization among wholesalers and retailers imposes a harsh and impossible burden upon petitioners which, in addition to being novel, is unfair, beyond the issues delineated by the complaint and beyond the Commission's discretionary authority. The words "including other customers who resell to purchasers who compete with respondents in the resale of such suppliers products" must, therefore, be stricken from the order if it is found that any order is appropriate.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that the Opinion and Order of the Commission must be set aside and the complaint dismissed.

Respectfully submitted,

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Dated: November 2, 1964

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Petitioners

APPENDIX

APPENDIX

List of Exhibits

Commission Exhibits	*For Identification* [1]	*In Evidence* [1]
1 (pp. 33, 37, 61)	R. 19	R. 32
2 A-C	R. 19	R. 32
3	R. 20	R. 32
4 (pp. 34, 39, 60, 61, 64)	R. 21	R. 32
5 A-B	R. 21	R. 32
6	R. 22	R. 32
7	R. 16	R. 32
8	R. 23	R. 32
9 B, C, D	R. 24	R. 32
11	R. 8	R. 42
12 A-B	R. 196, 303	R. 199, 303
13	R. 25	R. 32
14	R. 25	R. 32
16	R. 17	R. 32
17	R. 26	R. 32
18	R. 33	R. 36
19	R. 33	R. 36
21	R. 48	R. 48
22	R. 49	R. 50
23 A-B	R. 51	R. 54
24 (pp. 34, 59, 62)	R. 54	R. 54
25	R. 55	R. 55
26	R. 64	R. 65
27	R. 65	R. 66
28	R. 66	R. 67
29	R. 67	R. 69
30	R. 68	R. 69
31	R. 72	R. 74
32	R. 74	R. 83
33	R. 74	R. 83
34	R. 74	R. 83
35	R. 74	R. 83
36	R. 74	R. 83

[1] Page references are to the original transcript of record.

Commission Exhibits	*For Identification*	*In Evidence*
37	R. 74	R. 83
39	R. 84	R. 84
40	R. 84	R. 85
41	R. 85	R. 86
42 A-B	R. 104	R. 109
43 A-B	R. 104	R. 109
44	R. 104	R. 109
45	R. 104	R. 109
46	R. 104	R. 109
47	R. 104	R. 109
48	R. 122	R. 124
49	R. 122	R. 124
50	R. 122	R. 124
51	R. 122	R. 124
52	R. 122	R. 124
53	R. 122	R. 124
54	R. 122	R. 124
55	R. 122	R. 124
56	R. 122	R. 124
57	R. 122	R. 124
58	R. 122	R. 124
59	R. 122	R. 124
60	R. 122	R. 124
61	R. 122	R. 124
62	R. 122	R. 124
63	R. 122	R. 124
64	R. 122	R. 124
65	R. 122	R. 124
66	R. 122	R. 124
67 A-Z-5	R. 137	R. 139
68	R. 170	R. 172
69 A-B	R. 219	R. 221
70	R. 219	R. 221
71	R. 219	R. 221
72	R. 221	R. 223
73 A-B	R. 222	R. 223
74	R. 222	R. 223
75	R. 223	R. 223

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76 A-B	R. 224	R. 228
77	R. 225	R. 228
78	R. 225	R. 228
79	R. 226	R. 228
80 A-B	R. 226	R. 228
81	R. 227	R. 228
82	R. 227	R. 228
83 A-B	R. 229	R. 233
84 A-B	R. 229	R. 233
85 A-B	R. 230	R. 233
86 A-B	R. 230	R. 233
87 A-B	R. 231	R. 233
88 A-B	R. 231	R. 233
89	R. 232	R. 233
91 A-B	R. 233	R. 235
92	R. 234	R. 235
93	R. 234	R. 235
94	R. 234	R. 235
95	R. 234	R. 235
96	R. 239	R. 240
98 A-B	R. 248	R. 260
99 A-B	R. 249	R. 260
100 A-B	R. 249	R. 260
101 A-D	R. 250	R. 260
102 A-B	R. 250	R. 260
103 A-C	R. 251	R. 260
104 A-B	R. 251	R. 260
105 A-B	R. 251	R. 260
106 A-B	R. 252	R. 260
107 A-B	R. 252	R. 260
108 A-C	R. 252	R. 260
109 A-B	R. 253	R. 260
110 A-B	R. 253	R. 260
111 A-B	R. 253	R. 260
112 A-B	R. 254	R. 260
114	R. 304	R. 317
115	R. 304	R. 482
116	R. 304	R. 482

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117	R. 304	R. 482
118	R. 304	R. 482
119	R. 305	R. 317
120	R. 305	R. 482
121	R. 305	R. 482
122 A-E	R. 306	R. 317
123	R. 306	R. 317
124	R. 306	R. 317
125	R. 306	R. 317
126	R. 307	R. 317
127	R. 307	R. 317
128	R. 307	R. 482
129	R. 307	R. 317
130	R. 308	R. 317
131	R. 308	R. 317
132	R. 308	R. 317
133	R. 308	R. 317
134	R. 308	R. 317
135	R. 342	R. 342
136	R. 358	R. 706
137	R. 358	R. 706
138	R. 358	R. 706
139	R. 358	R. 706
140	R. 413	R. 419
141 A-B	R. 413	R. 419
142 A-B	R. 413	R. 419
143 A-B	R. 413	R. 419
144	R. 413	R. 419
145 A-B	R. 413	R. 419
146 A-B	R. 414	R. 419
147 A-B	R. 414	R. 419
148 A-B	R. 414	R. 419
149	R. 414	R. 419
150	R. 414	R. 419
151	R. 414	R. 419
152	R. 414	R. 419
153	R. 414	R. 419
154	R. 414	R. 419

Commission Exhibits	*For Identification*	*In Evidence*
155	R. 414	R. 419
156	R. 415	R. 419
157 A-B	R. 415	R. 419
158 A-B	R. 415	R. 419
159 A-B	R. 415	R. 419
160 A-B	R. 417	R. 419
161 A-B	R. 417	R. 419
162 A-B	R. 417	R. 419
163 A-B	R. 417	R. 419
164 A-B	R. 417	R. 419
165 A-B	R. 417	R. 419
166 A-B	R. 417	R. 419
167 A-B	R. 417	R. 419
168 A-B	R. 417	R. 419
169 A-B	R. 418	R. 419
170	R. 418	R. 419
171	R. 418	R. 419
172	R. 418	R. 419
173	R. 418	R. 419
174	R. 418	R. 419
175	R. 418	R. 419
176	R. 418	R. 419
177	R. 418	R. 419
178	R. 418	R. 419
179	R. 418	R. 419
180	R. 418	R. 419
181	R. 440	R. 443
182	R. 440	R. 443
183	R. 440	R. 443
184	R. 440	R. 443
185	R. 440	R. 443
186	R. 440	R. 443
187	R. 440	R. 443
188	R. 440	R. 443
189	R. 440	R. 443
190	R. 440	R. 443
191	R. 440	R. 443
192	R. 440	R. 443

Commission Exhibits	*For Identification*	*In Evidence*
193	R. 440	R. 443
194	R. 440	R. 443
195	R. 440	R. 443
196	R. 440	R. 443
197	R. 440	R. 443
198	R. 482	R. 483
199	R. 483	R. 483
200	R. 483	R. 483
201	R. 483	R. 483
202	R. 483	R. 483
203	R. 483	R. 483
204	R. 488	R. 490
205	R. 511	R. 531
206	R. 532	R. 533
207	R. 531	R. 533
209	R. 563	R. 563
210	R. 563	R. 563
212 N (p. 22)	R. 575	R. 579
214 (pp. 1-9)	R. 626	R. 628
215	R. 699, 708	R. 699
286	R. 699, 717	R. 699
287	R. 699, 717	R. 699
289	R. 699, 717	R. 699
293	R. 699, 718	R. 699
360	R. 732	R. 732
362	R. 750	—
363	R. 786	R. 787

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2	R. 646	R. 649
3	R. 646	R. 649
4	R. 646	R. 649
10	R. 866	R. 869
11	R. 866	R. 869
12	R. 866	R. 869
13	R. 869	R. 875